Supreme Court, U.S.
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No. 93-5161

In The

Supreme Court of the United States

October Term, 1993

WILLIAM ARNOLD PROCTOR,

Petitioner,

v.

CALIFORNIA,

Respondent.

On Writ Of Certiorari To The
Supreme Court Of California

JOINT APPENDIX

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Petition For Certiorari Filed July 8, 1993
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12/28/82 [sic]	Decision of California Supreme Court
3/10/93	Rehearing denied by California Supreme Court

7/8/93	Petition for certiorari filed
12/6/93	Certiorari granted

(MINUTES – Guilt Phase Verdict and
First Penalty Trial)

**SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SHASTA**

DEPT. III

#74024
THE PEOPLE OF THE
STATE OF CALIFORNIA,

Plaintiff

vs

WILLIAM ARNOLD
PROCTOR,

Defendant

DA#74024
Minute Book 47
Pgs. 120-120C
December 20, 1982

NATURE OF PROCEEDINGS

JURY TRIAL (Continued)

At 9:10 a.m., all counsel and the defendant, all the jurors and the two alternate jurors again being personally present, Court is again in session.

The Court addresses the jurors and alternate jurors concerning the issues to be considered by the jury in this matter.

At 9:20 a.m., the jury retires to resume deliberations and Court is in recess.

At 2:55 p.m., counsel and defendant, the jurors and alternate jurors again are present.

Mr. Kennedy makes an objection to the Court. The Court overrules the objection.

Mr. Forrester advises the Court the jury has reached a verdict as to the three Counts and presents the Verdict forms to the Bailiff and they are presented to the Court to be read as follows:

(TITLE OF COURT AND CAUSE)

We, the jury, find as follows:

COUNT I – MURDER

~~The defendant is Not Guilty~~

The defendant is Guilty of:

Murder First Degree X

~~Murder Second Degree~~ _____

In the event, and only in the event, you find the defendant guilty of Murder in the First Degree, answer the following:

First Special Circumstance: The allegation that the murder of BONITA BERGH STENDAL was in the First Degree, and was committed by the defendant while he was engaged in the commission of the crime of BURGLARY, is:

TRUE X
~~NOT TRUE~~ _____

Second Special Circumstance: The allegation that the murder of BONITA BERGH STENDAL was in the First Degree, and was committed by the defendant while he was engaged in the commission of the crime of RAPE, is:

TRUE X
~~NOT TRUE~~ _____

Third Special Circumstance: The allegation that the murder of BONITA BERGH STENDAL was committed by the defendant and that the murder was intential [sic] and involved the infliction of torture is:

TRUE	X
~~NOT TRUE~~	

DATED: 12/20/82

/s/ ART L FORRESTER
FOREPERSON

(TITLE OF COURT AND CAUSE)

We, the jury, find as follows:

COUNT II – RAPE

~~The defendant is Not Guilty~~	
The defendant is Guilty	X

In the event, and only in the event, you find the defendant guilty of the above offense, answer the following:

In the commission of the above offense the defendant, with intent to inflict such injury, personally inflicted great bodily injury upon BONITA BERGH STENDAL, to be:

TRUE	X
~~NOT TRUE~~	

DATED: 12/20-82

/s/ ART L. FORRESTER
FOREPERSON

(TITLE OF COURT AND CAUSE)

We, the jury, finds as follows:

COUNT III – BURGLARY

~~The defendant is Not Guilty~~	
The defendant is Guilty of:	
Burglary First Degree	X
~~Burglary Second Degree~~	

In the event, and only in the event, you find the defendant guilty, answer the following:

In the commission of the above offense the defendant, with the intent to inflict such injury, personally inflicted great bodily injury upon BONITA BERGH STENDAL, to be:

TRUE	X
~~NOT TRUE~~	

DATED: 12/20/82

/s/ ART L. FORRESTER
FOREPERSON

The Court polls the jury and the verdicts are unanimous. The Court directs the Clerk to file the Verdicts in the minutes.

The Court addresses the jury regarding the penalty phase of the trial and advises them the penalty phase will commence tomorrow, Tuesday, December 21, 1982 at 9:00 a.m.

The Court admonishes the jurors and the alternate jurors and directs them to return tomorrow at 9:00 a.m.

Court is in recess at 3:30 p.m.

cc: District Attorney
Probation Officer
Sheriff
Public Defender

/s/ J. H. Redmon
J. H. REDMON, Judge of the Superior Court

DA#82F261
Minute Book 47
Pgs 151-151A
December 21, 1982

NATURE OF PROCEEDINGS

JURY TRIAL (Continued)

At 9:20 a.m., all counsel and the defendant, the jury and two alternate jurors again being present, Court is again in session.

The Court addresses the jurors concerning the Penalty Phase of the trial.

Mr. Carlton addresses the Court and presents a Certified Copy of defendant's prior criminal Record at California Youth Authority and it is marked Plaintiff's Exhibit #127 and received into evidence.

Counsel rest.

Counsel present arguments.

The Court reads the instructions to the jury.

At 9:55 a.m., the jury retires to deliberate.

At 11:55 a.m., both counsel, the defendant and the two alternate jurors are present. Counsel stipulate that the jurors may be escorted to lunch, and that they may resume deliberations upon their return without reconvening Court.

At 2:45 p.m., upon a message from the Foreperson Art Forrester, both counsel, the defendant and the two alternate jurors are again present and Court is again in session.

Foreperson Art L. Forrester advises the Court the jurors are deadlocked 11 to 1 and there is no chance for a change in their decision. At this time the Court polls the jurors individually and each one confirms they will not change their vote in this matter. The Court declares a MISTRIAL in this matter. The jurors are thanked and excused by the Court.

The defendant and his counsel waive time for trial setting.

Minute Book: 47
Page: 151-A
Date: Dec. 21, 1982

HON. J. H. REDMON DEPT. III

#74024 PEO v WILLIAM ARNOLD PROCTOR (Continued)

THE COURT ORDERS this matter be continued to Monday, January 10, 1983 at 9:30 a.m. for further proceedings regarding resetting a trial date for the Penalty Phase of the trial.

The defendant remains remanded to the custody of the Sheriff of Shasta County.

cc: District Attorney
Sheriff
Public Defender
Probation Officer

/s/ J. H. Redmon
J. H. REDMON, Judge of the Superior Court

SACRAMENTO COUNTY SUPERIOR COURT

PENALTY PHASE ARGUMENTS

DISTRICT ATTORNEY (PARTIAL).

PEOPLE V. PROCTOR

CASE NUMBER 65383

* * *

[1462] MONDAY, MAY 16, 1983

1:32 P.M.

The matter of the People of the State of California vs. William Arnold Proctor, defendant, Number 65383, came on regularly for hearing on this day in the Superior Court of the State of California, in and for the County of Sacramento, before the Honorable Sheldon H. Grossfeld, Judge, Department Number Five.

The People were represented by Stephen S. Carlton, District Attorney, County of Sahsta [sic], State of California.

The defendant was represented by Stephen C. Kennedy, Deputy Public Defender, County of Shasta, State of California.

The following proceedings were had, to wit:

THE COURT: Good afternoon.

All right. The record will reflect the defendant is present along with respective counsel, the ladies and gentlemen of the jury are all present and in their respective places, as are the alternates.

Mr. Carlton, you may proceed.

MR. CARLTON: Thank you, your Honor.

I essentially discussed the – the law that I think is applicable to the case and now I would like to discuss for a few moments the evidence implicating William Proctor with these crimes.

Before I do that, I would like to read one additional instruction.

> "The fact that William Arnold Proctor has been found guilty of murder in the first degree with special circumstances, and that the special circumstances were found to be true, does not, in and of [1463] itself, constitute an aggravating factor or factors. You must examine the evidence presented to you at the trial and you must be satisfied beyond a reasonable doubt that the defendant, William Arnold Proctor, committed the crimes including the circumstances thereof, before you may determine whether or not the crimes and the circumstances thereof constitute an aggravating factor.
>
> "Reasonable doubt is defined as follows: It is not a mere possible doubt because everything relating to human affairs and depending upon moral evidence is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition they cannot say they feel an abiding conviction to a moral certainty of the truth of the charge."

So, when you examine the evidence, the evidence of the crimes itself and special circumstnaces [sic] involved, use that standard of proof, proof beyond a reasonable doubt.

Now, in order for – to return a death penalty verdict, defendant has to be found guilty of first degree murder and one or more of the special circumstances. This morning I discussed all the theories of first degree murder and all the special circumstances that have been found to be true. If you disagree with one or more of the theories, that does not mean that a death penalty verdict cannot be returned.

If you disagree with me that there was a burglary on [1464] April 21st, or disagree that the murder was in the course of a rape but you do conclude that the murder was premeditated and deliberated and therefore first degree murder,that's all we have to establish before you can consider the penalty of death in this case.

In addition to that, we have three special circumstances. If you find that the – again, that it was not in the course of a burglary, that it was not in the course of a rape, but that it did involve the infliction of torture, that's all you have to have. You've got the first degree murder and you've got one or more of the special circumstances which would qualify the defendant for the death penalty in this case, and then you would examine the evidence that you find to be true beyond a reasonable doubt and consider whether that evidence are aggravating circumstances and when you evaluate the aggravating and mitigating circumstances.

Now, when I said that we have to prove our case beyond a reasonable doubt, we don't have to prove every single little inference that I've drawn this morning beyond a reasonable doubt. In other words, if you say Carlton, I don't know how you can say that – that the

defendant was smoking a cigarette out there at J-2, that I'm just not convinced beyond a reasonable doubt that he was smoking a cigarette out there at J-2, doesn't mean that our case falls. Means that you – you disagree with that conclusion. But that doesn't mean that we haven't proven our case beyond a reasonable doubt.

When you evaluate each one of these pieces of evidence, it's only when after you consider the entire case that you say [1465] that you do not feel beyond a reasonable doubt that the crime of first degree murder has occurred, not that whether Carlton is all wet on his theory as to how it happened.

And I'd like to look at this point, look at the evidence pointing to the defendant's guilt of these crimes, and for a moment I'd like to look at the evidence without consideration of the print, the other evidence in the case.

All right. Where was the defendant on April 21st, 1982? Remember, on April 23rd he was arrested in Redding and he was talked to by Detective Jarrett and he told Detective Jarrett that he spent the night at home, that the ballgame was on and he wasn't into baseball and so he left shortly after the game went on, went down toward town, would be some place in here, and hitched a ride. And he hitched a ride from an older dude about thirty-five. And the guy was driving a Chevy truck, a green Chevy truck with loud headers on it, and he took him home.

And when he got home he sharpened some knives for his mother and he went to bed around eleven o'clock out of respect for his mother. That's what the defendant said he did.

Ladies and gentlemen, that is a lie. It didn't happen that way. And the reason why I went into some detail, it shows the consciousness on the part of the defendant. There's no mistake about it. This conversation occurred two days after the crime and he just didn't say I spent the night at home and they dropped it. He went into all these details. Got a ride from an older dude. He's consciously telling Detective Jarrett these lies. Got a ride home from an older dude. He was driving a green Chevy pickup with loud headers on it and I sharpened some [1466] knives. All these details.

I got up the next morning about 9:00 o'clock. My mother was watching game shows. All these details he was saying, each and every one of them lies.

Now, the importance of that is that that's a piece of evidence that you can consider. Does it prove beyond a reasonable doubt the defendant committed this crime? No. But it's a piece of evidence that you can consider along with the other evidence.

And you have to ask yourself why did the defendant lie? People don't lie to be lying. Lying is a means to an end. You don't get any particular charge out of telling an untruth unless there's a reason for it. And there's some reason why this defendant lied.

On April 22nd on the telephone at about 12:00 o'clock he's talking to Robert Manley and he tells Manley, "I was walking down towards town by Bernard's," by Bernard's in here, "and my mother picked me up and took me home and I went to sleep right away." Then I asked Manley on the stand, "Did you talk to him? Did you ask him if he watched the game?" "Yes, I asked him.

He said he didn't." "Did you ask him if he watched the movie Jenny?" "Yes." "No, I went right to bed. I was tired. I went right to bed. I didn't watch TV." Again, he's lying.

And he admitted to Detective Jarrett that he was lying there. And what does he tell Detective Jarrett? Says, "I liked to Robert about that. Really I wanted to just get out of the house because they had alcohol there." And he's got some sort of avsion [sic] to alcohol which the evidence really supports.

He's the one that bought the alcohol that they had there. [1467] But he didn't want to be manipulated into staying there because they had alcohol there.

The defendant on April 22nd when he was talking to Robert Manley lied to him.

Okay. Now, did – did the defendant go home that night? Well, he certainly didn't go right home like he said. He didn't come down to Bernard's down here because here is Manley's house and here is Jeff Bohall's house. He left Manley's house at about 8:45 and about ten minutes after 9:00 or so he's at Bohall's house. That's what Bohall said.

He's watching the – the Fall Guy on TV starting at 9:00, ended at 10:00. He came shortly after it started and he left shortly after – before it ended. So he's there about forty-five minutes.

All right. From the time he leaves Bohall's house nobody sees him. Not Ed Proctor, not Julia Proctor, not Mrs. Manley, not Robert Manley. Nobody sees him from

the time he leaves Jeff Bohall's house at ten minutes to 10:00 until 5:30 the next morning right here at P-2.

At 5:30 on April 22nd he's seen walking towards town, which would be down this direction toward Jerry's there. He's seen walking this direction wearing loose-fitting jeans, white socks and sandals. And he's seen there by his own aunt who watches him walk for about a half a block and that's Bill Proctor.

When is he next seen? At 6:00 o'clock in the morning George Stenlund who has known the defendant for five or six years is right here at Jerry's Market and sees him out there in this – some place in this vicinity here using a pay phone.

[1468] He's the one that said he was watching him from two hundred yards away and then when I pointed out to him that was two football fields he then said no, it was probably less then seventy-five. But he saw him in a phone booth.

Then after he makes the call what does the defendant do? He goes to Jerry's and gets change. And George Stenlund is at Jerry's standing twenty feet away from him and he sees the defendant who he's known for several years.

What next? Ed Proctor receives a telephone call from him at 6:30. The defendnat [sic] says, "I need to have mom pick me up. I'm at the Holiday Market." Consistent. Holiday Market is one of these places here. (Indicating.) I'm not sure which, but it's one of these in here. It's right in there. That's the holiday market. That's where the defendant was at 6:30.

Q. Okay. So that right there is some evidence that this defendant is involved. Not proof beyond a reasonable doubt but it's certainly evidence for you to consider and consider with all of the other evidence that we have in the case.

The cigarette butt. Again, that's a piece of evidence for you to consider. That's found at J-2. It's a nonfilter cigarette. And that's what the defendant was smoking.

The scratches on his legs. Now, this – this is unusual to have this. (Indicating.) You don't often – always go around. Doesn't mean that he's involved in a murder but it's unusual to have it.

What's even more unusual is for him to say on April 23rd to Detective Brewer, "I have no idea how I got those scratches or those burns." Had no idea.

[1469] Robert Schauer's testimony. Remember Robert Schauer? He's the one that taught the trucking couse [sic] that the defendant took in February of 1981. It was a month-long course, five days a week, about six hours a day. And he taught him how to tie knots. Taught him how to tie a double halfhitch and a trucker's knot.

And Mr. Schauer also testified that he's been teaching that course for a number of years and that approximately one out of forty to fifty students know how to tie those knots when they first take that course or when they come in at the beginning of the course.

Now, you might know how to tie a trucker's knot. I don't know. But that's the evidence from – from Mr. Schauer.

I'm sure all of you don't. The defendant does. The defendant knows how to tie a trucker's knot and a double halfhitch. And one of those is a double halfhitch and one of them is a trucker's knot. (Indicating.)

People's No. 119, that is the double halfhitch. People's No. 120 is the trucker's knot.

Okay. Then we showed Mr. Schauer People's No. 107. Now, this is one of the sashes that was removed from the hands of the – or the wrists of Bonnie Stendal. And we showed this to him and you recall the testimony that it was cut off so that it preserved the knots. And he looked at it and he found the double – or the trucker's knot, and I believe that's it right there, the trucker's knot. He said that's exactly how you tie a trucker's knot.

Okay. So, looking at that evidence, the defendant's statement of his whereabouts, he was gone from the time he left [1470] Bohall's house to the time that he's seen at – Pallky's house at 5:30 the next day, his statement, the scratches on his knees, all of this is evidence of his involvement in the case.

And then we have the print. And the print, as I indicated, just brings down the curtain on who murdered Bonnie Stendal because the defendant's palm prints are on those books. The defendant was in that house on April 21st and that's when he left those palm prints.

And the defendant was in there after Bonnie Stendal was murdered. He was in there after 8:00 o'clock because she wasn't bleeding before 8:00 o'clock and his prints are in blood.

Now, you remember the testimony of Mike Schaeffer that when they went in there on April 30th back in there and examined the – the bed and started taking the bed apart, that's when they found these books and they were all scattered about, and that he packaged them up according to whether he thought they had blood on them.

Here's People's No. 91. That was underneath the bed.

[1471] MR. CARLTON: People's Number 89 was underneath the bed. And then People's Number 90-A through C, they were underneath the bed. Those are all I'm going to use for this purpose. There was a lot more books under there, A through M, or actually B through M were underneath the bed. But these are the key ones.

All right. Bonnie Stendal, you recall Fran Evans took a blood sample at the autopsy, had type 0, PGM factor 2. And that's her blood.

All right. 103 here, this is the – this is the sample that Fran Evans on April 23rd, which she took from the carpet where the pool of blood was, and it was still damp, and this is the area that she took it from, and that blood is type 0, PGM factor 2.

All right, 91-A. All right, 91-A, that had blood on it, and that had blood on it PGM factor 2, type 0, the same blood as Bonnie Stendal's, right down to the PGM factor and the type. Type 0, PGM factor 2, which two to three percent of the people have.

All right. Now, this also, I want to be careful and read my notes, make sure I don't make a mistake on which books had which. This had a palm print, the right

palm print of the defendant. So the defendant touched this with his right palm.

Now, this is a print that was lifted, where they put the subtance on it and actually lift the print off of it, and you can still see the black substance or something that was used to lift the print.

[1472] All right. 90-A had human blood, PGM factor 2, and it had the right palm print of the defendant. Okay. So he placed his right palm on that particular book.

People's Number 89, that had the right palm print of the defendant, and that was analyzed by Fran Evans as being human blood that was on it.

Now, People's Number 89 is different from the other books, as far as the print is concerned. The print is from the oils on the other books. The print on People's Number 89 is actually in blood.

And you can see the print, if you look in the jury-room at People's Number 89, you'll see the print right on there. It's still on there. And you'll see that. And what you see on there is Bonnie Stendal's blood.

That has not been lifted. Nothing has been done to People's Number 89-A. Marty Collins just took a magnifying glass and read that and compared it as it was when it was delivered to him by Ken Myers. That is still her blood. No processing was done to People's Number 89.

Now, further, you remember the stipulation from Marty Collins. Further, on People's Number 89, that blood was on his hand and then his hand was placed on the book. It wasn't that there was blood on the book and somebody came in contact with it, the blood was on his

hand and then and of course, the blood is wet, otherwise you wouldn't have the transfer, so he's got her wet blood on his right palm and then he comes into contact with People's Number 89.

Now, as indicated, the defense has stipulated to all [1473] that, there's no issue in that, that's why you didn't hear the testimony of Marty Collins. They haven't stipulated that's what he said, they've stipulated that that in fact is what happened. That the defendant, while he had her blood on his hand, grabbed a hold of that book and left his palm there, and what you see on People's 89 is actually her blood.

People's Number 90-B, "Getting What You Go After," a print was lifted off of that, and that is a palm print. Now, this is different, it wasn't in blood, it was – they used the chemical substance to lift it off and the defendant's left palm is on People's Number 90-B.

So that, you take those prints and then it puts pretty much in perspective the other evidence that we've had. Shows you why the defendant lied. Gives some reason to why he lied to Robert Manley on April 22nd, why he lied to Detective Jarrett on April 21st. Explains where he was from the time he left Jeff Bohall's until he was seen by his aunt. Puts all these things in perspective. There's no question about it that he was in that house.

Okay. Now, I've gone over essentially the evidence and the crimes involved. Now I want to discuss with you a little bit in closing the instructions concerning the aggravating and mitigating factors.

> "It is now your duty to determine which of the two penalties, death or confinement in the state

> prison for life without possibility of parole, shall be imposed upon the defendant. After having heard all the evidence and after [1474] having heard and considered the arguments of counsel, you shall consider, take into account and be guided by the applicable factors of aggravating and mitigating circumstances upon which you have been instructed. If you conclude that the aggravating factors outweigh the mitigating circumstances, you shall impose a sentence of death. However, if you determine that the mitigating circumstances outweigh the aggravating circumstances, you shall impose a sentence of confinement in the state prison for life without possibility of parole. Before you may consider a particular aggravating circumstance to be true, you must be satisfied of the existence of that aggravating circumstance beyond a reasonable doubt."

So if you conclude that the aggravating circumstances outweigh the mitigating circumstances, you are obligated to return a verdict of death.

And we spent a considerable amount of time on voir dire on this issue, and you indicated that if that was the case, that would be your verdict. And I'm not suggesting that this is an easy experience for you, but I think that we have reached that point. I believe in the jury system and I know you're going to be fair and return the verdict that you think is just in this case.

So I'd like to at this time go over the factors that [1475] you will have to consider and see where they fall in this particular case.

> "In determining which penalty is to be imposed on the defendant, you shall consider all of the

evidence which has been received during any part of the trial of this case, except as you have been instructed in the course of this phase of the trial. You shall consider, take into account and be guided by the following factors, if applicable. A, the circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstance or circumstances found to be true. The presence or absence of criminal activity by the defendant which involve the use or attempted use of force or violence or the expressed or implied threat to use force or violence. The presence or absence of any prior felony conviction. Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance. Whether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act. Whether or not the offense was committed under circumstances which the defendant reasonably believed to be a moral [1476] justification or extenuation of his conduct. Whether or not the defendant acted under extreme duress or under the substantial domination of another person. Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or mental defect or the effects of intoxication. The age of the defendant at the time of the crime. Whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor. Any other circumstance which extenuates the gravity of the crime, even though it is not a legal

excuse for the crime, including but not limited to the defendant's character, background, history, mental condition, and physical condition."

Okay. Before I close, I would like to go over those factors, and I submit to you that in looking over those factors, there are only two mitigating circumstances and the rest in this case are aggravating.

The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstance or circumstances found to be true. That's the case itself. That's this (indicating). [1477] And I submit all you have to do is take a look at People's Number 63 and that's an aggravating circumstance.

This was a brutal murder, and I'm not trying to be emotional. This was a brutal murder.

Then the other special circumstance, the torture, the fact torture was involved. That is the crux of the case, it's the case itself and the circumstances. And that's what makes this case so aggravating is the killing itself, the manner in which she was killed, the punishment and pain he administered on Bonnie Stendal.

Okay. Factor number two, the presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the expressed or implied threat to use force or violence.

This is a mitigating circumstance. There was no evidence offered by the People of any prior activity of violence on the part of the defendant. That is a mitigating circumstance.

The presence or absence of any prior felony conviction. That is an aggravating circumstance. The defendant has two burglary convictions, one in 1980, one in 1981, and an auto theft, which is part of, in 1981, which actually was part of the 1981 burglary. That is a circumstance in aggravation.

Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance. I submit he was not under the influence of mental or emotional disturbance.

There was no evidence that he had any kind of a mental derangement, other than what anybody who would do that would [1478] have. And the evidence was that he, again, that he was rational at the time of this offense, that he knew what he was doing, he knew it was wrong, that's why he cleaned up and that's why he took precautions not to get caught.

That's why he lied to Detective Jarrett, why he talked to Manley or lied to Manley. He was acting rationally. That's why he washed his clothes the next day. He didn't want to get caught. He knew what he was doing. That is a circumstance in aggravation.

Whether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act. Obviously Bonnie Stendal did not consent. We don't have to spend much time on that one. That clearly is a circumstance in aggravation.

Whether or not the offense was committed under circumstances which the defendant reasonably believed to be a moral justification or extenuation of his conduct. I

don't know if the defendant thought it was – that he was morally justified in it, but I certainly know he wasn't reasonably morally justified in doing it.

Clearly there was no moral justification for what was done to Bonnie Stendal. That again is a circumstance in aggravation.

Whether or not the defendant acted under extreme duress or under the substantial domination of another person. There was no other person involved in this offense. Bill Proctor killed Bonnie Stendal by himself, and all the evidence in this case shows that.

[1479] Now, I don't know, again, I'm anticipating a little bit, I don't know what Mr. Kennedy is going to say on that. Whether he's going to say that Manley was an accomplice of his, but I'll get to that in a moment.

The age – excuse me, I missed one.

Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or mental defect or the effects of intoxication. There is absolutely no evidence again that he was under – that he was impaired by mental disease.

And again, the evidence of intoxication shows that he had three drinks, and that he knew what was going on when he committed these acts.

The age of the defendant at the time of the crime. I submit that is the second and the last mitigating circumstance. The defendant was twenty at the time the act was committed.

So there are two mitigating circumstances.

Whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor.

I want to read for a moment the accomplice instruction.

> "An accomplice is one who is subject to consideration for the identical offense charged against the defendant on trial. To be an accomplice, a person must have aided, promoted, encouraged, or instigated by act or advice [1480] the commission of such offense with knowledge of the unlawful purpose of the person who committed the offense."

All right. Now, going back here, reading this one again, whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor. I suggest that there is no evidence that he was an accomplice. He was not only involved heavily, he was the only one involved in it.

Remember, again, People's Number 89. The defendant's palm print on her blood, while her blood was wet. He was involved in it. There was nobody else involved.

Robert Manley was home. We went to great extent to show that. He said that he watched the movie Jenny. We showed what time the movie came on, about 12:45, and ended at 2:45 or something at night.

He said he watched it, he told you who was in it. He said he watched the ball game, all of the ball game, and his mother came home and said he was watching the game when she was there.

Robert Manley was not involved in this offense. The other things that he testified to that are supported by the evidence. The defendant, he said the defendant left ten minutes after the game came on, the defendant said he did. And the defendant got over to Jeff Bohall's, the defendant was by himself, Robert Manley wasn't with him.

At 5:30 on the 22nd, when he's out in front of Mrs. Palkki's, house, Robert Manley wasn't with him. The defendant was there [1481] alone and committed this crime alone and nobody helped him.

All right. Any other circumstance, this is the last one. Any other circumstances which extenuates the gravity of the crime, even though it is not a legal excuse for the crime, including but not limited to the defendant's character, background, history, mental condition and physical condition.

Now, I submit that there is nothing that has been presented to you that would extenuate this crime. There's nothing about the defendant's background that you heard that would extenuate this crime.

According to his aunt, he was a normal, average boy growing up, and his mother said that, essentially, as I recall. The only thing you know about his background is that he's had a little history in burglary, takes things that don't belong to him, and he is a violent person. That's what you know about his background. To me, that is not extenuating circumstances.

Again, his mental condition. There is no evidence that he was suffering from any sort of mental defect, and his physical condition apparently is not bad.

One further instructin [sic], and then I'm going to close.

> "In determining the question of the penalty to be imposed upon William Arnold Proctor, you shall weigh the sympathetic elements of his background against those that may offend the conscience. In so doing, you may consider pity, sympathy, and mercy for the defendant. However, you may not be governed by conjecture, [1482] prejudice, or public opinion."

That instruction says in so doing, you may consider pity, sympathy and mercy for the defendant. Doesn't say you shall. That you shall take that into consideration, if there is any basis for sympathy.

And let me suggest that in this case, there is no basis for sympathy for William Proctor. This is what he does on April 21st, 1982. That's what he does on April 21st. On April 22nd, what's he do? He shows absolutely no remorse.

MR. KENNEDY: Objection, your Honor.

THE COURT: The objection is sustained.

MR. CARLTON: Well, I'm going to go into what he did on the 22nd.

THE COURT: All right.

MR. CARLTON: What does he do on the 22nd? He goes about his business like nothing happened. He

goes to Redding. He goes with Bob Manley. And they go there for the purpose of having fun.

[1483] The defendant spent April 22nd, 1982, having fun, less than twenty-four hours after he did that, and I submit there is no basis for sympathy for William Proctor in this case.

Now, I know, or I'm again anticipating that Mr. Kennedy is going to suggest to you that today is the most important day in his client's life, and he's going to ask for your sympathy. Well, let me suggest to you that today is not the most important day in his client's life. The most important day in Bill Proctor's life was April 21st, 1982. The most important time was when he was outside of this room at J-2 smoking that cigarette. That was the most important moment in Bill Proctor's life and everything that followed that is inevitable.

Anybody knows that if you viciously kill somebody you're going to be sitting right over there. And at that point while he's smoking that cigarette he had a choice. He could either turn around and walk away and Bonnie Stendal would be alive and we wouldn't be gathered here today. But once he made that choice everything is inevitable, and the most important time is when he was out in front of that bedroom.

Now, if you've got the impression that – that I'm callous about this, believe me, I'm not. I know that this is an important, awesome responsibility that you have. And believe you me I'm not here because I want to be. There are lots of places I'd rather be than here.

But I suggest to you that I'm here because it's necessary, and I'm asking you in this case to return a death verdict not because you want to but because under the law of California it's necessary. Thank you.

[1484] THE COURT: I think what we'll do is rather than proceed at this time we'll take a short recess to give – so we won't have to interrupt your argument, Mr. Kennedy.

We'll reconvene at 3:30, ladies and gentlemen. Again, I call to your attention the admonition heretofore given to you your duty not to converse among yourselves or with anyone else on any subject connected with this trial, nor shall you permit anyone else to speak to you on any subject connected with this trial, nor shall you form or express any opinion thereon until the matter is, in fact, finally submitted to you.

Please return at 3:30.

Mr. Burruel, did you have a problem?

JUROR BURRUEL: Did I hear you say 3:30?

THE COURT: 2:30. Excuse me. Can't see the clock up there. 2:30.

(Recess.)

(The following proceedings were had in open court out of the presence of the jury:)

THE COURT: All right. The record will reflect the defendant is present along with respective counsel, we're outside the presence of the jury and the alternates.

Either counsel wish to be heard?

MR. KENNEDY: Yes, I do, your Honor.

What I heard toward the conclusion of Mr. Carlton's argument was that he mentioned the word "remorse" to which I objected, and then he thereafter went and characterized remorse in a more graphic detail. And I think the jury should be instructed that remorse is not a statutory grounds for [1485] aggravation in this case.

THE COURT: The Court has instructed the jury as to the law and the Court will do so. He did not indicate that the remorse was an aggravating – a ground for aggravation. Under the reasonable interpretation of his comments, the jury was in response to the arguments against sympathy, under those circumstances the Court does not intend to give any further instructions with respect to remorse.

The Court sustained the objection because it was a conclusion. However, the testimony – I beg your pardon, his argument was consistent with what the evidence was introduced as to the conduct of Mr. Proctor which is uncontradicted at this time. Under those circumstances the objection is overruled. Your request is denied.

MR. KENNEDY: Thank you.

THE COURT: Mr. Carlton, you wish to be heard?

MR. CARLTON: No, your Honor.

THE COURT: Anything further, Mr. Kennedy?

MR. KENNEDY: No thank you.

THE COURT: We'll reconvene at 3:30.

(Recess.)

(The following proceedings were had in open court in the presence of the jury:)

THE COURT: All right. The record will reflect the defendant is present along with respective counsel, the ladies and gentlemen of the jury are all present and in their respective places, as are the alternates.

Mr. Kennedy?

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* * *

FENALTY PHASE ARGUMENTS

DEFENSE ARGUMENT (COMPLETE)

[1486] MR. KENNEDY: Thank you, your Honor.

Counsel, ladies and gentlemen of the jury, you are a jury and I thought the first thing we ought to talk about is what is a jury. There's an instruction that should help guide you in that.

> 'Both the People and the defendant are entitled to the individual opinion of each juror. It is the duty of each of you to consider the evidence for the purpose of arriving at a verdict if you can do so.
>
> 'Each of you must decide the case for yourself but should do ~~so~~ only after a discussion of the evidence and instructions with the other jurors. You should not hesitate to change your opinion if you are convinced it is erroneous. However, you should not be influenced to decide any question in a particular way because of a majority of the jurors or any of them favor such a decision.'

Now, what that should tell each of you is that each of you is a judge and you have a responsibility on the one hand to discuss and communicate with your fellow jurors, but on the other hand you have an independent responsibility in the eyes of the law and you can, each one of you, each one of you can think of yourselves as the judge of this case anyway of William Arnold Proctor.

So, it's not a committee. You may be taking votes back in the jury room but that doesn't make it a democracy. Each one of you has a singular responsibility and regardless of what verdict is here today, of course, each one of you are going to [1487] have to live with that, but more importantly I think it's important in the conduct of how you deliberate, that is what is it that you do and what is it that you say back in the jury room.

You won't get any instructions on that. You get to guide yourself pretty much on how you want to communicate inside that jury room. But I want you to keep in mind and the first thing I want to tell you is that it's up to each one of you individually. It's not a community effort.

Each of you have to consider this individually because the law requires it and, of course, that's the most important duty, I suppose. But secondly, that each of you must consider these items that we get an independent view of this evidence.

And what are we doing in real life? We're getting away from the mob mentality; okay? People can do things together that they can't do singly, that they can't do – I mean twelve people can do something that one person wouldn't or wouldn't even think of doing.

And so we think with this number of people that we can filter out those elements and come to a decision based upon reason, based upon logic, not based upon emotion.

You know Mr. Carlton's gone to great lengths to show you blood and guts. Now, why would he do that? He wants to get that passion going. He wants that mob

mentality to surface. Obviously wants everyone to act orderly but that's his purpose and I understand that.

But that's why these pictures are here. They have very little evidentiary value by themselves. If you want to talk what's the first thing I see is a scraped knee. We can look at [1488] a scraped knee. We've all had them. I mean, there's no purpose to have that picture there other than to show some blood on the picture.

That's what we're trying to get away from. I not only don't want you to use sympathy, I insist that you don't. We want this case to be decided on the evidence exclusively and very particularly.

And in that regard, I think I can tell you how you will arrive at your verdict. If you consider the facts and events that have been presented here before you in a general fashion, if you pick them out in a disorderly way or in ways that appeal to you, the evidence that you remember the best, you are going to give him the death penalty. On the other hand, if you look at this evidence and you examine it particularly and show where it goes consistent with these instructions, you'll come in with a verdict of life in prison without the possibility of parole.

And I'm confident if we speak after this – after this tirbunal [sic] is concluded, that that's how you are going to make that decision. And let me give you some examples.

I'll be giving you examples. That's actually the theme of what I'm here to talk about today is how we're going to look at this evidence.

First of all, let's – who introduced the evidence? Most of the evidence was introduced by Mr. Carlton. He has the privilege of going first in this particular case. Much of the evidence that he introduced I would have introduced, but since he brought it in first I get to – I always think of it as piggybacking along with him and ask questions which will solicit [1489] the information that I think is important to you even though he may have called that person to the witness stand.

Some of this evidence is exculpatory and I certainly would have introduced it during my part of the case.

He gets to go first. That's why it appears that way.

Now, in exchange for that I get to go last in argument. And so there's really no – no basic unfairness in comparing the two opponents here.

What we're talking about is the particularity of the evidence. Well, I'm going to give you examples and I think all the way through my talk there are going to be examples of this particular theme.

Example number one. Where was Bill Proctor the night of April 21st, the morning of April 22nd? Mr. Carlton asked that question and he said well, we know he was here and we know he was there.

Well, that's okay. Some of that was true. I disagree factually, I think, with what he said and I'll get to that a little bit later, but the most important thing about that is that the defendnat [sic] didn't testify.

And the problem, and let me read the instruction that the judge will read to you about that.

'It is a constitutional right of a defendant in a criminal trial that he may not be compelled to testify.

'You must not draw any inference from the fact that he does not testify. Further, you must neither discuss this matter nor permit it to enter [1490] into your deliberations in any way.'

No, this is a bit dicey it appears to me. If we're going to talk about if Mr. Carlton is going to argue that we have some burden to tell you something, that is contrary to this instruction That's exactly what we're not required to do.

So, while it may be – it may appear to be an effective argument, if you look at it particularly it is quite unfair to the defendant because the law requires that you not consider the fact that he has not testified.

While I'm on that subject, I want to cover it right away, that is something that attorneys and clients talk about in almost every case, and it's a decision that's made based upon a myriad of factors.

Each case is a little bit different. I would like each of you to know that I participated heavily in that and I participated in the decision making. I don't think I can tell you much more about that, but if you find some gut reaction, you know, that sticks in your craw because he did not testify, please blame it on me, not him. I'm the one that's supposed to be the smarter of the two and supposed to have more acumen in that area, and I felt it was best.

And that's about all I think I should say about that under the circumstances.

The defendant may and has relied upon the state of the evidence. That's another instruction.

'In deciding whether or not to testify, the defendant may choose to rely on the state of the evidence and upon the failure, if any, of the People [1491] to prove beyond a reasonable doubt the existence of every factor determined by you to be an aggravating factor, and no lack of testimony on defendant's part will supply a failure of proof by the People so as to support a finding against him on any such factor.'

Now, what I'm trying to do is I'm trying to focus very particularly on that evidence, on the People's evidence. I have the right to – to make him prove this to your satisfaction, and that's what I'm demanding that he do, and that's what I'm saying I don't think he did. And I'll explain why later but that's our right. That is the theory of this defense.

If the defendant doesn't testify, that's because our theory is inconsistent with what – with him testifying in this matter at all.

So, let me – first of all, I was paying attention or I hope I was this morning and waiting for Mr. Carlton to start talking about aggravation and mitigation because that's really what we're talking about. In making your decision today the instruction says, and I'm sure you'll read it, weighing circumstances in mitigation and aggravation. And those two, neither one of those words were used before lunchtime so that, I think, may serve to illustrate part of what I'm talking about.

We have a dichotomy. On the one hand this person's been convicted. On the other hand you have to make a

decision whether that conviction was worthwhile or not. You have to find that your verdict is consistent with one that has gone before it. And that's why it was really necessary for Mr. Carlton to talk about the very foundation of this case.

[1492] And there we're talking about first degree murder. We're talking about his four theories. Okay? Rape, burglary and torture.

Now, on top of that if you can get past this hurdle, then we get into the special circumstances. There are three of those. That is the burg – burglary, the rape and torture.

Now, if you can get through those and say yes, that – that young man did it, then you get to where the decision is being made. X marks the spot. That's what this case is all about.

All right. These are the foundation upon what this decision making process will be. Right in here. And it's very simple. There aren't many instructions about that.

But keep in mind that when we're talking about these things, you have to satisfy yourselves, each one of you individually has to satisfy yourself as to the existence of these, the truth of them or any one of them as you go along in order to even discuss the issue for which this tribunal was called.

This is the procedure. At least this is the way I think about the procedure and that I conceive of this procedure here today, and it – it is a little bit convoluted but I think the more you work with it the more you'll understand what it is and why it operates this way.

Let me start at the beginning. I'm not going to argue about first degree murder. I'm not going to argue about – well, I will argue about torture but let's just take first degree murder for example.

Ask yourself what item of evidence tells me this was [1493] deliberate. And by that we mean deliberated. Doesn't mean that you intend to do it but what it means is you think about it.

What? I don't know. A cigarette butt I think, perhaps -if I look around in this case and I've been acquainted with it almost as long as Mr. Carlton, I can't find anything that tells me that.

Okay. Now, there are any number of ways that it could be told, I suppose. I just don't know what they are. If you think well, a guy wouldn't do this if he didn't think about it ahead of time, that''s not evidence. That's an inference supported with no fact at all. And that's what we're talking about or what I'm talking about when I talk about particularity.

Okay. You think it's true. Why do you think it's true? What fact indicates that? What testimony did you hear? What item of physical evidence tells you that that is true?

Deliberation. I don't know. I do know one thing about deliberation and first degree murder, and that is cleaning up afterwards is not a part of it. Not a part of it in any way, shape or form. Because you've – you will get the instructions on the concurrence of act and intent.

So that a first degree murder is either completed or it fails at the time that the assault or however it's accomplished is done. What you do the next day or five minutes later is not important in the eyes of the law in terms of determining mental state for first degree murder.

Okay. That means I've got to form the intent ahead of time, then I've got to go ahead and act and as soon as that act is completed, and I reach a safe place, then the crime's over with. [1494] I can't consider or you can't consider what goes on. That's what the concurrence of act and intent is.

There are crucial things that separate certain crimes – certain kinds of crimes. Mr. Carlton touched on burglary. At the time that you enter a building you got to have some felonious intent. Those two things have to join together before that crime was committed.

That's what we're talking about when we're talking about deliberation, premeditation, et cetera, et cetera, et cetera.

Now, let's talk about burden of proof just briefly. These two have to be proved beyond a reasonable doubt. So when you examining these and you are going to necessarily examine them twice, that's the standard that you are to apply to those two boxes. That's everything that appears in here. This is a weighing process. And there's a different standard of proof as the judge will instruct you.

So, in examining these things, let's look at – let's look at a burglary. Now, I – my personal belief is the burglary that's mentioned at this juncture and the burglary that's

mentioned here are the same. They're not only the same burglary but also they're the same elements that go into it. The same require – general requirements, so that when you are examining them you don't have to do it twice perhaps. The burglary.

Okay. Mr. Manley or Mr. Proctor or Mr. X had to enter that residence with the intent of doing something felonious in there, specifically rape. Okay.

Now, breaking and entering, that's part of it, but they [1495] have to have that requisite intent. Now, what – what fact tells you that that intent exists? The cigarette butt. That seems to be so crucial to somebody for some reason. The cigarette butt is surmised that – that someone was out there smoking and looking through this window and developed an intent to do something felonious.

That is just a supposition. There isn't one fact that supports that. There isn't a fact to tell you how long that long that cigarette butt was there. Matter of fact, it didn't even say Camel. It was just an unfiltered cigarette.

I remember I asked about whether it was wet or not and yeah, it was wet but we didn't get into weather and certainly no weather was proved as to whether that narrows it down in time at all. That cigarette could have – butt could have been there for one minute, it could have been personnel that investigated the scene. There's nothing specific about that cigarette butt that narrows it down, that helps us. There's nothing particular about it. There's nothing onerous about it at all.

Perhaps some of us don't smoke but aside from that there's nothing onerous. So, I don't know how you conclude that somebody had any intent upon entering that building.

I don't know. I can't find a fact in my own mind that would help me support that and I'm trying to do it. I'm trying to anticipate what it is that you are going to do in the jury room. I just can't think of one.

You notice that the intent has to be rape too, and again, I guess this is because of the – because of the condition of the living room. There again, that's just a – that's just a [1496] supposition. We don't know that Mrs. Stendal or anyone was lying down on that couch on April 21st or April 22nd or that she was lying there when a person was standing outside the window smoking a cigarette. We don't know any of these things. We suppose them. We're supposing them without a fact to support them.

Okay. Dena Humble says, 'Oh, I was in her house yesterday and that wasn't there.' Well, that tells you something; it's been moved. It doesn't tell you Mrs. Stendal moved it. Doesn't tell you a lot of things. But it helps narrow down the – the possibilities here.

But keep that in mind as we go all the way through here.

Rape. There's not a lot I want to say about rape because there isn't a lot of evidence about rape. It is seen or perceived by the prosecution as the motive for this crime, again, for reasons that particularly escape me. I

don't know why that has to be the motive and theft wasn't the motive. I don't know why those things exist.

I think the motive depends largely on who it was that was in there and that – at the time, at the relevant time, and we'll talk about that later.

But if you will remember Dr. Stephens' testimony about rape, he was talking about there's an injury inside the vagina that was caused by either a foreign object or a penis. He didn't know which one. If he had to choose one he would choose a penis.

Now, that has to add up to the fact that a rape was committed; okay? The doctor isn't sure. I mean, there are other laws that cover other kinds of conduct which could have been [1497] charged in this case, but this is the one they chose and we were lucky enough to hear just exactly why they chose it and how they chose it.

MR. CARLTON: Your Honor, I'm going to object to this.

THE COURT: The objection is sustained.

MR. CARLTON: I think it misstates --

THE COURT: The objection is sustained. Proceed.

MR. KENNEDY: The – the – there is no other evidence which supports any conclusion that that crime even existed, that it even occurred.

Damage inside a vagina can be caused by any number of things and you are asked to believe beyond a reasonable doubt that it occurred, not only I'm not talking about who did it or how it occurred or consent or any

of those other things, just did it occur. Was it an unlawful event? I think so but I'm certainly not convinced beyond a reasonable doubt.

[1498] MR. KENNEDY: Torture is the one that is going to give me the most difficulty, because it also includes some of the legal nuance that is peculiar to this case.

Torture, at this level, is defined as causing cruel pain. That's the phrase I always remember, cruel pain. Torture here is defined differently. There are different requirements for this one.

So I will assume that the person or persons who punctured the chest and who scratched the knife across the neck of Mrs. Stendal tortured her. I will assume, I can think of no other reason to do that, I can conceive of some, but I'm just going to give that matter away for now. I think it's more illustrative if we look at it that way, we'll just put that in our pocket and assume that exists.

This torture has to do with extreme pain. And again, going back to Dr. Stephens' testimony, what he said was that the injuries around the chest, cutting of the neck, was not extreme pain, was not severe pain, I think is the word that he used, and that essentially became translated to extreme. That the extreme portion of the pain that she suffered, if any, was done to the injuries around the neck, so much damage that that is where the supreme – the extreme pain occurred.

That – that's my memory of the testimony, that is how she was killed. That is the reason for her death. So that if we conclude that the perpetrator of this crime

strangled this person, that is a conviction of murder, perhaps, certainly homicide, it's a homicide, it's a murder, but it's not torture. The purpose of that is death.

[1499] Do you see how they work off against one another? This requires an intent to kill. Well, the intent to kill and the intent to cause extreme pain merge into one another at this juncture, and I don't know how legally you can find this special circumstance torture to be true.

I don't think the law provides for it with the evidence that we had from Dr. Stephens. I want to underline that testimony, because the answers were given upon questioning by the judge. And it's my belief, anyway, as to why those questions were asked, and I was going to ask them, too. So the idea is that you fail at this point.

There's another thing I'd like to say about torture before I leave it, essentially forever. The law does not require that a person perceive this pain. You and I think of torture as, you know, inflicting pain. All right. And we usually think of it in terms of, oh, I don't know, I – looking at my children, sometimes I think they are torturous. But the idea that I always think of when I think of torture is war time, prisoners of war, doing things which cause pain to get people to do other things.

That's a classic kind of torture. They are conscious, you are controlling them by the use of this pain. I think that's the common conception of what torture is.

But the law doesn't agree with that common conception. The law says this person can be completely unconscious and it would not make any difference. If you feel you can get beyond this point and you get to X marks the

spot, you get to weighing things, and you're weighing torture, keep that [1500] in mind. Because I think that's the important distinction that the law is trying to make for you.

You are asked, if you even arrive there, you are asked to weigh circumstances in aggravation and mitigation and compare that with torture. Well, what are we talking about? We're talking about a good torture versus a bad torture? A painless versus a painful torture?

These concepts are something that I know we don't like to talk about, and we don't like to be confronted with, but I think the law requires us to do that.

So when you're asking torture, if you can get beyond this point, and I don't believe you can, but if you feel that you can, then we get here and we get to – we have to weigh that off against other circumstances.

And I think that being conscious is the circumstance that is the most consequential in this arena. If Mrs. Stendal was conscious, fully conscious, when these injuries took place, it's an aggravated torture. If she was not conscious, it's a mitigating torture.

Whose responsibility is it to prove whether Mrs. Stendal was conscious? The prosecutor. That is his duty. And he cannot do it.

That's why those questions were asked, exactly for that reason, because I think when we get here, no matter what, as terrible as the idea of torture is, the legal definition does not correspond with what I think we commonly conceive of.

But using torture as an example, that is the procedure [1501] that the Court and the law of California is asking you to apply.

Now, you don't have unfettered authority when you get to weighing the circumstances in aggravation and mitigation. You're going to be given some direction and you are only to consider the statutory factors of aggravation and mitigation, and you may feel that a factor is important. I wish I knew that. You know, I will have to guess at what that might be. But that is what you are not to consider. The law says we have to be particular here. And that's why the lists are enumerated.

We can all think that there's things that maybe ought to be off the list that are on and things that maybe ought to be on that are off it, but we are stuck with the law, as Mr. Carlton said several weeks ago, and that's what it pertains to.

So you have to confine yourself to the statutory factors that are enumerated.

Going back to my theme of particularity versus general, let's talk about the identity of this assailant. Inevitably I have to talk about that. We have circumstantial evidence, that's been defined to you, and it's been read by Mr. Carlton, and I think you understand what that is.

There is something that you have to supply. I disagree with Mr. Carlton, circumstantial evidence isn't nearly as good as direct evidence. You're going to get several pages of instructions on how you are to view circumstantial evidence, and you're going to get virtually none on how you view direct [1502] evidence. The reason

for the rules is that's where the fear is. That's where the problems are.

If a mistake's going to be made, it's going to be made because of the value of that evidence, and so you are to look upon it with some caution.

Now, I'm not going to sit up here and say Mr. Proctor wasn't involved in this case or in this trial. I think that's a mistake and I'm sure it's not true. The print that we've talked about, I very much want to talk about that print. We've admitted that Mr. Proctor what have we admitted? You've been told he's been convicted of first degree murder, it's not a big revelation to you.

That is Mr. Proctor's palm print. Now, that one item of evidence on People's 89-A, I believe it is, I think is the most damning single piece of evidence I have ever seen. I mean, if you had to get one item of physical evidence to indicate a crime, that a crime was committed, and the identity of somebody who might be involved in that crime, they've got it, it's around here somewhere, it was on the floor last time I saw it. But it's here.

I'm not going to ignore that fact. I want you to look at it, I want you to think about it. I don't want you just to assume that Mr. Proctor did all these things because his fingerprint appeared in the house of Bonnie Stendal, because that's not looking at this case with particularity, with clarity. Doesn't make it any clearer, makes it a lot foggier.

Other things about that fingerprint evidence that was interesting was the identity of the fingerprints that were [1503] lifted at the scene all together. If you'll recall, there

were two fingerprints of Mrs. Stendal, one of Mr. Bishop, another police kind of personnel, and then several of William Proctor.

The thing that was remarkable about that to me is we have a house that Bonnie Stendal has lived in for years and years and years and years, and only two of her fingerprints are in her own home.

Now, that is kind of a curious fact, it seems to me, and it's curious because it shows you how unreliable fingerprint evidence can be. I'm sure we'd all assume there would be hundreds, maybe thousands of fingerprints in our own homes, in those homes, but that isn't the case. We have an easy illustration of the fact that that's not the case.

So if you say, well, since Manley's fingerprints weren't in that house, he couldn't have been there, that's a failure of logic, because fingerprints just aren't left every day. You can be in a house for years and only leave two.

So that's that's a unique item of that, or a unique component of the fingerprint evidence all together. The lack of a fingerprint doesn't prove anything. The inclusion of a fingerprint proves that person touched that item, okay, at some time. And that's all it proves.

Let's look at the fingerprint with particularity. The fingerprint was made, on 89-A was made in blood. Type O, PGM factor 2. Fine. That means that that impression was made after Mrs. Stendal bled. If it's Mrs. Stendal's blood. That's all it means.

[1504] Now, I am reasonably sure that the bleeding that took place during this assault was minimal, and I would think, I think she suffered some injuries to the inside of her mouth, and I would suggest that's probably where the majority of this blood came from. It's nothing, I guess, that you can speculate about from viewing the pictures. But one thing is for sure. The fatal injuries were not produced by – or bleeding was not a component of them.

So you have to make a big quantum jump as to whether they happened at the same time. And time is the second most important factor in this case, and it's something I'll be talking about more and more and more.

Because the value of the circumstantial evidence is contingent almost exclusively by time. And this case, the evidence in this case is almost void of any consideration of time. And I'll be getting into that a little bit more.

So, let's – when did Mrs. Stendal die? We don't know. Mr. Carlton chooses to use April 21st as the day. But I think anybody could choose to use April 22nd, if they would like.

I would think that she was found the morning of April 22nd, late in the morning of April 22nd, her body was found, she was last seen about 8:00 o'clock the evening before.

Now, something happened in that period. What fact can we rely on with particularity that will help us narrow that down? Doesn't that make a big difference? It makes a big difference to me.

First thing that comes to my mind, intoxication. Okay. [1505] If this happened over six, eight hour period of time, I don't think intoxication would be an issue at all. Person has a chance to assimilate the alcohol in his bloodstream, and that's just an example. Time is very important in identifying with particularity what inferences you can draw from the facts that you have.

The one thing that I remember is the water dripping from the tire wells of Mrs. Stendal's car. Now, if we assume that the assailant drove Mrs. Stendal's car and if Larry Jarrett sees the water dripping from the fender wells about 10:00 o'clock in the morning, it's reasonable to assume or I would assume that that assault took place in the very early morning hours of April 22nd.

That's the only fact I can come up with, and I've tried desperately to narrow this down into time somehow. Because alibi only has value when compared to the time. Accomplice only has value when compared to time. We're talking about who committed this, and it's important to decide when it was committed to compare it with the time elements.

Let's take Robert Manley, for example. Robert Manley is very convenient in his testimony in this case. Very, very convenient. He alibis himself, just about completely, incriminates Bill just about completely, and there's no way to verify anything that he said.

Now, that's a pretty convenient way to do this. Mr. Manley is also a convicted felon, along with Mr. Proctor. We know that the two of them were good friends. They did a lot together, they shared, at least I guess Mr. Proctor

[1506] was frequently over at Mr. Manley's house, stayed there without even an invitation. These are very good friends.

We know that a year before, 1981, they both committed a burglary together. They've been friends for quite some time. Several years, I think the testimony was.

Then they are both arrested. Excuse me, they are both apprehended, and taken to the Shasta County Sheriff's Office. Manley says A, B, C, D, E, F, G. Proctor says X, Y, Z. They let Manley out the door and they say, Billy, you're our boy. And it seems clear to me, they compare the evidence they have against one against the evidence they have against the other, so they said we don't have any evidence of two, so we'll just let Mr. Manley go.

It seems to me obvious that that was the conduct of this investigation. Because at no time after that that I'm aware of did anyone attempt to eliminate Mr. Manley as a suspect.

Consider this for a minute. Consider the state of the evidence the day that Mr. Proctor and Mr. Manley are arrested for this offense. What did the police know at this stage?

They knew a murder had been committed, or at least a homicide had been committed. I don't know what else you can say. The phone wires were cut, there are other things about the scene, but as far as the identity of the people or persons involved in this, they didn't know that.

Why did they pick up those two gentlemen? We all know why. Because they suspected that one or both of

them, probably [1507] both, were involved in it somewhere.

They know Mr. Manley lives right around the corner. This is a small community. And this is no accident, it's no accident at all. It's just good police work. They are going to say we're going to round up all the people that we think have the ability to do this, and who are the first people they're going to round up? Mr. Manley and Mr. Proctor.

Now, let's look at what could have been done to eliminate Mr. Proctor in any one particular fashion. How about typing his blood? How about examining him for injuries? How about searching his house? How about running tests on him? None of these things were done and they weren't preserved and we can't go back and do them now.

But that's the problem with this circumstantial evidence. The state of the law in this case is that you can find Mr. Proctor, you can sentence him to the gas chamber and he didn't even commit the murder.

I'm not talking about the identity of the person, I'm talking about the state of the law, that that is capable of doing, and I think that's the most fearful thing, as I will mention later on. That has to do with this entire case.

Mr. Manley is acquainted with the Stendal residence, has busted in there a couple of times before. These are all general characteristics of Mr. Manley. It's nice for me to sit here, Monday morning quarterback, and say they should have done some other investigation, eliminate Mr. Manley, if they could. That didn't happen.

To put it in its proper perspective, it doesn't mean, [1508] nor does it prove, in any way, shape or form, that Mr. Proctor acted alone or that he was in there at the relevant times at all. It doesn't prove that. It's a nice accusation to make, but the law requies [sic], and I said at the outset, we want you to rely on the facts and the law, exclusively.

And look at these things, turn them over, examine them as you will, and try to make whatever inferences are possible out of this, and I'm sure that you'll end up with a sentence of life in prison without the possibility of parole.

To further illustrate that – no, excuse me, let me back up just a minute.

I don't want to belabor the point, I can't try Mr. Manley in this case. I don't know what occurred. If I were to sit here and guess, as to what might have occurred or how I can use facts or even my own common sense to figure out whether this was done by one person, two people, or even the identity of the person, I can't do it.

The palm print is helpful. It sure is. It's a damning piece of evidence. But it's not all that helpful. It tells me he was there, but that's all it tells me.

Okay. It tells me that he was there after bleeding occurred. But I don't know, I mean, Mrs. Stendal could have been – well, see what am I doing, I'm guessing again. That's what we can't do. We can try to use our common sense, but we got to have a fact to ground it to. That's what I mean by particularity.

So I'm going to leave Mr. Manley for now. It's not my job to prove that he did this or participated in any way, [1509] shape or form. The facts, there is nothing that says that he isn't heavily involved in this and perhaps even the perpetrator of the crime. There's no fact that says that isn't true.

The facts you try to use are facts supplied to you by Mr. Manley, which, as I say, is very convenient in this particular case.

Before I – let me continue on with this, and I don't want to bore you with it, because I think you'll be able to see what my point of view is and I think if you will attempt it, you will probably do a better job than I do, if you look at things in particularity.

The cigarettes, and I have already talked about. These scratches. Okay. On the knees. They are a skinned knee, as far as I could tell.

That's, I suppose, a fact. But what are we going to do with it? What inference can be drawn, what deduction can we make from the existence of those?

Well, first of all, they were observed on a certain day. The doctor testified in his opinion they were within, you know, so much period of time, and included the time that might have been involved in this particular case, although they didn't match up exactly.

We know what Mr. Proctor was doing, pretty much during that period, and I know that what happened on – or we know from the evidence that what happened on the 22nd of April was that Mr. Manley and Mr. Proctor drank copious amounts of alcohol and ended up with a couple

of young ladies and [1510] it was the next day said I don't know how I got them.

Now, it may seem incriminating to you, but it's not examining the evidence with particularity at all. Now, it's not up to you to supply the missing link here, it's up to Mr. Carlton to provide it for you. So what does that mean? It doesn't lead you anywhere, you can make assumptions but you can't, as an individual, you can't really say that that's a fact or a truth or that it supports an inference that I would want to make in a case of this magnitude, actually in any case.

[1511] The knots. Want to touch on the knots. I – I guess I would have been one of the forty or fifty people that knew how to tie those knots. I know how to tie a lot of knots. But I also know that they're very, very common. And I think if you look at it it doesn't lead you anywhere.

They – the testimony was that – I don't know how many months before April, 1982, that these and other knots were taught to the defendant as part of a course in truck driving. Doesn't say he learned them. Doesn't say he knows how to tie those or even that they're – they're applicable and appropriate to the crime in this particular – there's nothing tying those things together. Nothing at all.

Again, you can make an assumption but you can't draw an inference and that's what – that's why I'm talking about particularity.

Now, I'd like to talk about what we really came here to do and that is this right here. (Indicating.)

Now, I'm going to assume for a minute that in your deliberations you decide to consider this matter, that is the ultimate matter that your verdict will reflect and that being the comparison or weighing of aggravating and mitigating factors.

Now, I suppose you could do it any way you choose, but you might say let's assume all of the – you know; that we can find all of those factors in the first two steps, let's start there and weigh it because if we can't – if it comes out on the side of mitigating, these other findings don't matter to you. They're very inconsequential to you.

You don't have to find the truth of a first degree murder [1512] a rape or a burglary or even consider that matter if you start here and you say well, I'm weighing these two off against one another and I think mitigation tips the scales. That may be your verdict. That may well be your verdict.

That's why I want to discuss these very particularly. Mr. Carlton has two that he wants to take to the bank and I have two that I want to take to the bank.

And there's an instruction which says that you are not to just count them up but that you are to weigh them and give them the credit to what – that you think they deserve.

I heard in listening to Mr. Carlton's argument, I think this is the way that this – this case is going to break down to a comparison of these and perhaps some other factors. Now, you are to consider these factors and weigh them as you feel appropriate, and you are given no other direction than that.

So, I would like to talk about them specifically. This is the circumstances of the crime. That's what crime means. And that's when I wrote up there.

Mr. Carlton says this is a vicious murder. And I don't know what the opposite of a vicious murder is but I think all murder is vicious and I think if I have the responsibility and the duty of examining this murder, that I ought to make some determination as to whether this is a vicious murder or not.

Can you strangle somebody in a gentle – gentle way? Aren't all strangulations aggravated? Not in the eves of the law. Not in the eyes of the law.

You may choose to weigh that and compare it with what you know in other instances. Okay.

[1513] I don't want to be too ghoulish about this but the – we all read the newspapers and there are brutal crimes that happen every day. This one is not particularly heinous. It doesn't jump out at me as being one that is greater. I can think of twenty to thirty right off the top of my head that are much more serious than – than this.

The law forces us to look at that. It's a very unpleasant kind of thing to even think about, but that's what Mr. Carlton is asking you to say. He's asking you to say this one's worse than other ones. This is an aggravated murder. Therefore, there must be a mitigated murder and you are to consider the opposite or the contrary of that and I don't know that that's really possible to do in the first place, but in the second place it's not really supported by the evidence.

If she was conscious that would make a big difference. If she was strangled first and the other things happened while she was, you know, in the process of dying as Dr. Stephens said, that would make a difference. We don't know any of these things.

And Mr. Carlton in his argument, and I trust I'm quoting it correctly, "I don't know the sequence of events," quote, unquote. Of course he doesn't. Dr. Stephens wouldn't tell us that. We don't know how this thing occurred.

There are ways that you can put it together that makes it more painful and more brutal than others, and I don't know what to do with that other than to suggest to you that there's been a failure of proof in this regard. Been a failure to meet a level of proof that we all know exists.

Talk about felony. Felonies in this case, two burglaries [1514] and an auto theft. You heard Mr. Manley characterize one of those burglaries. Mr. Manley and Mr. Proctor broke into a pizza parlor, Sam's Pizza Parlor, and they stole, I think he said 800 dollars worth of beer, or they were in the process of stealing it.

They figured out they couldn't carry it. It's too much beer to carry. So they stole a car, an old Ford product, I think, and backed it in, station wagon, backed it in and loaded it up with beer and off they go. They were apprehended a short while later and then both convicted of those.

That's it. These are the aggravating factors that Mr. Carlton is asking you to consider and return a death penalty verdict on. That's it.

MR. CARLTON: Your Honor, I'm going to object to that. That misstates my argument and the evidence.

THE COURT: The objection is sustained. Let's proceed.

MR. KENNEDY: On the other hand, these are all the mitigating factors that we have, that we can take to the bank anyway or that we are confident of. (Indicating.)

Youth. What does youth mean? Why would that be a mitigating factor? In California at age eighteen a person becomes eligible for the death penalty, that is a person who's seventeen cannot be executed.

The younger a person is the more we feel that the more exculpatory criminal conduct is going to be.

This is the one that's perhaps the most persuasive in my – in my mind and that is lack of prior violence. We're not talking [1515] about lack of prior criminal convictions for violence, we're talking about a lack of violence altogether; okay?

We're asked to believe that the first time that Mr. Carlton – Mr. Proctor gets violent, this is what results. And that's why this is a factor.

So, these are the ones we're asking you to compare. I think this event is kind of anomalous. I don't know what to do with this prior felony. It's a burglary but it's a

commercial burglary. It's a so-called second degree burglary.

The burglary that's charged in this case is a different animal.

Circumstances of the crime we've already talked about. This is a one-time event. How long did it take? We don't know when it occurred, so we don't know how long it took. But it took, you know, periods of time to occur.

These things take a lifetime to accrue. And that is what you are asked to compare. Can one violent event outweigh a lifetime of something else, of less than violence, of nonviolence? Is there a redeeming quality here that is – that – actually is rather obvious but there are other factors that I would like to discuss and not – won't take too long.

Excuse me, I'll read the whole instruction to you.

> "In determining which penalty is to be imposed on the defendant, you shall consider all of the evidence which has been received during any part of the trial of this case, except as you have been instructed during the course of this phase of the trial. You shall consider, take into account [1516] and be guided by the following factors, if applicable: Circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstance or circumstances found to be true. Presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the expressed or implied threat to use force or violence. The presence or absence of any prior felony conviction. Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance. Whether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act. Whether or not the offense was committed under circumstances which the defendant reasonably believed to be a moral justification or extenuation of his conduct. Whether or not the defendant acted under extreme duress or under the substantial domination of another person. Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or mental defect or the effects of intoxication. The age of the defendant at the time of the crime. Whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor. [1517] Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime, including but not limited to the defendant's character, background, history, mental condition, and physical condition." We have talked about circumstances of the crime.

Presence or absence of any prior felony conviction, whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance. The interesting thing about that instruction is I would think that this is a pretty disturbing event and perhaps a disturbed mind was responsible for it. The unfortunate thing about this instruction is that they use the term "defendant" and again, it depends on how you slice the pie how you eat the dessert, and you

assume that it's Mr. Proctor, then you are right, there's no evidence been introduced as to mental disturbance at all. You assume it's somebody else, then I don't know where that would lead you. But that's something for you to consider. I think it depends on the person.

Whether or not the victim participated in the defendant's homicidal conduct or consented to the homicidal act. I think that's inapplicable in this particular case. I think it's designed toward a case that we don't have here.

> "Whether or not the offense was committed under circumstances which the defendant reasonably believed to be a moral justification or extenuation of his conduct."

We don't know why this occurred. Remember, Mr. Carlton [1518] is surmising that the motive was rape. Certainly there's no moral justification for that or I would – I would find – I would be very surprised if somebody could claim that they felt there was a moral justification for that kind of conduct.

But if we don't know what the motive is, we don't know whether this factor applies or not. If it does – well, we just don't know. It's difficult.

> "Whether or not the defendant acted under extreme duress or under the substantial domination of another person."

The only time the word "manipulate" was used, it was used to quote Mr. Proctor in some hearsay testimony about Mr. Proctor's being fearful of Mr. Manley's manipulating him.

Now, that's the only time I think that word even came up. Duress I don't think was done at all.

You may, I suppose, if we're drawing a – if we're assuming things, we may assume since Mr. – Mr. Manley is bigger, he's older and he's more experienced, that Mrs. Proctor said that – that Bill has always been a follower and never been a leader, we can assume that maybe there is some elements of that. I don't think we've proved it. I don't think that if you take my idea of examining these facts, examining these facts for particularity, that you can really come up with that conclusion.

But if you are going to make assumptions throughout your deliberations, you can certainly make one there to the benefit of the defendant.

> "Whether or not at the time of the offense the capacity of the defendant to appreciate the [1519] criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or mental defect or the effects of intoxication."

Again, if we assumed – let's assume that Mr. Proctor, that we're considering Mr. Proctor in examining this particular circumstance. Intoxication. If Mr. Proctor had a few cocktails, went over to Bohall"s for a few minutes and then went over to Stendal's and did all this by himself, he may well have been intoxicated.

It's important when these things occur to tell whether that's true or not; okay? If it didn't happen that way, if Mr. Proctor is not the person, Manley gets liquored up at his house and goes over to Stendal's house for one reason or another later on in the evening or

maybe even during this time and – and he commits these acts and then returns and he and Mr. Proctor go upstairs, Mr. Proctor is staying, and Mr. Proctor helps him dispose of the body at this – at that juncture, intoxication may well be a part of this case.

Mr. Manley certainly was intoxicated that evening. I think he admitted that. He admitted drinking throughout that period of time.

I remember 'cause I asked him that – for that – for specifically that reason. So, intoxication is another one of these things that if you look at it particularly you can say well, it may be a component of this case. It may be a factor I want to consider.

If you consider it a factor that's appropriate, I think [1520] you have to give the benefit of the doubt to the defendant. You don't have to consider it. You don't have to feel that it's applicable at all, but if it applies it applies to the benefit of the defendant.

> "Whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor."

An accomplice – well, Mr. Carlton read you the instruction on accomplice; aid, encourage. A person who helps dispose of a body is an accomplice for sure. I mean, there's no question about that in the eyes of the law.

I'm not – I don't know what happened in this particular case, but if that's the case then Mr. – Mr. Proctor qualifies for that as a mitigating factor.

Okay. If you are making assumptions, you can make that assumption.

This is a new procedure, relatively new procedure, and there's no directions that I can find that help you very much in examining and weighing these things. I've spent my weekend trying to figure out how I would do it and what I would consider in doing this. Let me just give you some of my thoughts.

This felony, he's paid his price for that. We know that. I mean, he was convicted of that. That's why the felonies resulted. He paid his price for that.

That appears to me to be a juvenile event at best. By juvenile I mean not very mature. I don't put a lot of weight on that.

Theft type, you know, younger people are prone to theft [1521] type crimes. After a while I guess we all learn supposed to keep our hands on our own property, but this is not something that – that indicates an evilness of heart that might generate a – a giving this full dignity.

And let me compare it with –

MR. CARLTON: Your Honor, I'm going to object to this argument at this time. He's characterizing this as one felony. I think it –

THE COURT: The objection is sustained.

MR. KENNEDY: I'm sorry, I meant –

THE COURT: Well, there was a stipulation as to three felonies.

MR. KENNEDY: Excuse me, three felonies, and I'm not giving that much weight. It's not particularly similar. I don't think that's the purpose of this particular factor.

The purpose of this particular factor in my opinion is is there a prior act which is similar. Are there prior felonies that are violent? Prior homicides?

Consider what – if this was one felony, homicide, what would you think about weighing these factors off? They'd be considerably different. And I think that's what the people had in mind when this was enacted, that this wasn't supposed to be any we'll just add them up on the ledger sheet. I don't think that's it at all.

I think we're supposed to look at that and see what it tells us about the defendant and you determine what you will as to what that tells you about the defendant. It tells me he's immature. It tells me he's got a problem of drinking and keeping [1522] his hands to himself.

It doesn't tell me that he's a murderer. It doesn't tell me that he's a person who's worthy of being executed by the State of California.

No, I don't –I don't think that's part.

Circumstances of the crime. We've already talked about that. Now we get into the youth. I feel that there are two components when it comes to youth. One component is the judgment that we gain as we get older and older and that a person the older they get the more culpable they get for their acts. And that's why – that's why there's this old expression of you are old enough to know better.

[1523] MR. KENNEDY: That's what age is all about, that we somehow develop judgment. Now, this judgment that we develop improves as we get older. And so that the older a person is, the more culpable he would be for this particular kind of a crime.

There's another component which I think is interesting, and that is youth has a lot to do with how long a person spends in prison. If the verdict is life in prison without the possibility of parole, and that's the verdict for Mr. Proctor, actuarially, he's going to live to be eighty-five years old, he's going to spend more time in prison because of his youth. So that should be a mitigating factor towards him. So I think there are two reasons to consider this a mitigating factor.

And the last one is the most important factor. No prior violence. That leads me to believe that either Mr. Proctor wasn't involved, he wasn't alone, or something very disturbing happened. I don't know what it is, there's a failure of proof in this particular area. But I know one thing, that this is an uncontradicted fact.

I don't know, I'm going to conclude right now, and there is a lot more that I would like to say, but I think considering the hour and I think I'm getting a little bit tired, that it would be most efficacious for me to close, it's something I've been kind of looking forward to, anyway.

I'm not going to talk about the death penalty as a political event. It's enacted, it's the law of this state. I agree with part of it, I disagree with part of it, personally. [1524] But that's not important. I'm not going to try to talk you out of it. It's your duty to consider it and you all promised that you would consider it.

And I'm not going to try to make a political statement about the death penalty. I think we're all acquainted with the arguments for and against, and it's a difficult question, at best. I think I would be applying to your pity or your sense of empathy that – if I talked about these things.

And keep in mind that we want you to look at the evidence with the greatest particularity. We don't want you to make assumptions, we want you to make legal reasonable logical inferences.

But there are two things I would like to say about the death penalty. One, this is a book I found in the Shasta County library not long ago, and it is a reporter's description of an execution in the gas chamber in California.

MR. CARLTON: Your Honor, I'm going to object to that.

THE COURT: Sustained. May I see it, please. The objection will be sustained. The Court is familiar with that piece of work.

MR. KENNEDY: The last thing I want to talk about is a personal note. I've been acquainted with this case for about a year, and I, I think, like all of us, we make vows to one another or vows to ourselves, rather, and promises. And a lot of them we break. And I make the distinction in my own mind that if I promise myself something, I will do it. I have never failed to do that.

A vow, I might not make it to the full extent, but [1525] promises, and that's why I use that word to myself, I must carry it through, it is my duty, the passion.

The last time was quitting smoking. I promised myself I would never have another cigarette again, and that was three years ago. That's just an example of a promise.

Well, I've made myself a promise in this particular case, and it's one I invite each one of you to make. If possible, I'm going to go to the execution. I have heard –

MR. CARLTON: Your Honor, I'm going to object to this.

THE COURT: Objection sustained. It's improper argument. Confine yourself to the law involved in this case.

MR. KENNEDY: Ladies and gentlemen, the biggest fear in this case that we all have, everyone in this room has, is that we execute the wrong person. That possibility exists, as long as circumstantial evidence is used to prove his guilt. Without direct evidence, that possibility exists. And that is what rests on this particular case.

There are examples of people who are convicted who later are acquitted or found out not to be true. It does happen. And the way it happens is circumstantial evidence. The way it happens is that people make assumptions instead of using the facts and logically the way the law intended.

(PENALTY PHASE JURY INSTRUCTIONS (partial))

[1529] TUESDAY, MAY 17, 1983 9:40 A.M.

The matter of the People of the State of California vs. William Arnold Proctor, defendant, Number 65383, came on regularly for hearing on this day in the Superior Court of the State of California, in and for the County of Sacramento, before the Honorable Sheldon H. Grossfeld, Judge, Department Number Five.

The People were represented by Stephen S. Carlton, District Attorney in and for the County of Shasta, State of California.

The defendant was represented by Stephen C. Kennedy, Deputy Public Defender in and for the County of Shasta, State of California.

The following proceedings were had, to wit:

THE COURT: Good morning, ladies and gentlemen. Apologize for the delay in starting.

All right. The record will reflect the defendant is present along with respective counsel, that the ladies and gentlemen of the jury are all present and in their respective places, as are the alternates.

"Ladies and gentlemen of the jury:

"You have now heard the evidence in this phase of the trial and we have come to that place in the trial where you are instructed on the applicable law.

"I am required to read the instructions to you in open court. In addition, you will have these instructions in the jury room for your use during your deliberations, and you may follow

the Court's reading of the instructions as I do so.

[1530] "The bailiff," Officer Studebaker, "will now hand each of you a copy of the instructions which the Court is now reading."

And I will be commencing my reading on the fourth paragraph down. I'd ask you to read the instructions with me. Do not read them faster than I do and I ask you to read slowly as I will do so that you will have a better understanding of what the instructions state.

Starting with the fourth paragraph, page one. You will notice the instructions are paginated for your use in your deliberation room if you desire to do so.

"You will find that the instructions may be either printed, typewritten, or handwritten. Some of the printed or typewritten instructions may be modified by typing or handwriting. Blanks in the printed instructions may be filled in by typing or handwriting. Also, portions of printed or typewritten instructions may have been deleted by lining out.

"You are not to be concerned with the reasons for any modifications that have been made. Also, you must disregard any deleted part of an instruction and not speculate either what it was or what is the reason for its deletion.

"Every part of an instruction, whether it is printed, typed or handwritten, is of equal importance.

"You are to be governed only by the instruction in its final wording, whether printed, typed, or [1531] handwritten.

"The defendant, William Arnold Proctor, has heretofore been found guilty of murder in the first degree. The charges that the murder was committed under the following special circumstances have also specially been found to be true, to wit: That the murder was committed in the commission of a burglary; that the murder was committed in the commission of a rape; and that the murder was perpetrated by torture.

"It is the law of this state that the penalty for a defendant found guilty of murder in the first degree shall be death or confinement in the state prison for life without possibility of parole in any case in which the special circumstances charged have been specially found to be true.

"Under the law of this state you must now determine which of said penalties shall be imposed on the defendant.

"It is my duty, in these instructions, to explain to you the rules of law that apply to this phase of the trial. You must accept and follow the rules of law as I state them to you.

"The fact that William Arnold Protor [sic] has been found guilty of murder in the first degree with special circumstances, and that the special circumstances were found to be true, does not in and of itself constitute an aggravating factor or factors. You must examine the evidence presented to you at [1532] this trial, and you must be satisfied beyond a reasonable doubt that the defendant William Arnold Proctor committed the crimes, including the circumstances thereof, before you may determine whether or not the crimes and the circumstances thereof constitute an aggravating factor.

"Reasonable doubt is defined as follows: It is not a mere possible doubt, because everything relating to human affairs and depending on moral evidence is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge.

"In determining which penalty is to be imposed on the defendant, you shall consider all of the evidence which has been received during any part of the trial of this case, except as you have been instructed during the course of this phase of the trial. You shall consider, take into account, and be guided by the following factors, if applicable:

"(a) The circumstances of the crime of which the defendant was convicted in the present proceeding, and the existence of any special circumstance or circumstances found to be true.

"(b) The presence or absence of criminal activity by the defendant which involved the use or [1533] attempted use of force or violence, or the expressed or implied threat to use force or violence

"(c) The presence or absence of any prior felony conviction.

"(d) Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.

"(e) Whether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act.

"(f) Whether or not the offense was committed under circumstances which the defendant reasonably believed to be a moral justification or extenuation of his conduct.

"(g) Whether or not the defendant acted under extreme duress or under the substantial domination of another person.

"(h) Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or mental defect or the effects of intoxication.

"(i) The age of the defendant at the time of the crime.

"(j) Whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor.

[1534] "(k) Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime, including but not limited to the defendant's character, background, history, mental condition and physical condition.

* * *

[1557] Ladies and gentlemen, it is now your duty to determine which of the two penalties, death or confinement in the state prison for life without possibility of parole, shall be imposed upon the defendant.

After having heard all of the evidence, and after having heard and considered the arguments of counsel, you shall consider, take into account, and be guided by the applicable factors of aggravating and mitigating circumstances upon which you have [1558] been instructed.

If you conclude that the aggravating circumstances outweigh the mitigating circumstances, you shall impose a sentence of death. However, if you determine that the mitigating circumstances outweigh the aggravating circumstances, you shall impose a sentence of confinement in the state prison for life, without possibility of parole.

Before you may consider a particular aggravating circumstance to be true, you must be satisfied of the existence of that aggravating circumstance beyond a reasonable doubt.

Reasonable doubt is defined as follows: It is not a mere possible doubt, because everything relating to human affairs and depending on moral evidence is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge.

In determining the question of the penalty to be imposed upon William Arnold Proctor, you shall weigh the sympathetic elements of his background against those that may offend the conscience. In so doing, you may consider pity, sympathy, and mercy for the defendant. However, you may not be governed by conjecture, prejudice, or public opinion.

[1559] In considering, taking into account, and being guided by the aggravating and mitigating circumstances, you may not decide the effect of such circumstances by the simple process of counting the number of circumstances on each side. The particular weight of such opposing circumstances is not determined by the relative number, but rather by their relative convincing force on the ultimate question of punishment.

If a factor is not found by you to be a mitigating factor, that in and of itself does not make that factor an aggravating factor. In order for a factor to be considered an aggravating factor you must be satisfied beyond a reasonable doubt that the factor does exist, and it is only if you determine that the factor exists beyond a reasonable doubt that you may consider the factor an aggravating factor.

If you determine that the aggravating factors do not outweigh the mitigating factors, or if you determine that they are equal, you must return a verdict of life imprisonment without the possibility of parole.

If any rule, direction or idea in these instructions has been repeated or stated in varying ways, no emphasis was intended and you must not draw any inference because of its repetition. You are not to single out any certain sentence or any [1560] individual point or instruction and ignore the others. You are to consider all the instructions as a whole and are to regard each in the light of all the others.

The order in which the instructions have been given has no significance as to their relative importance.

Ladies and gentlemen, I have not intended by anything I have said or done, or by any questions that I may have asked, or by any ruling I may have made, to intimate or suggest what you should find to be the facts on any question submitted to you, or that I believe or disbelieve any witness or witnesses.

If anything I have done or said has seemed to so indicate, you will disregard it and form your own opinion.

You have now been instructed as to all the rules of law that may be necessary for you to reach a verdict. Whether some of the instructions will apply will depend upon your determination of the facts. You will disregard any instruction which applies to a state of facts which you determine does not exist. You must not conclude from the fact that an instruction has been given that the Court is expressing any opinion as to the facts.

Both the People and the defendant are entitled to the individual opinion of each juror.

It is the duty of each of you to consider [1561] the evidence for the purpose of arriving at a verdict, if you can do so. Each of you must decide the case for yourself but should do so only after a discussion of the evidence and instructions with the other jurors.

You should not hesitate to change an opinion if you are convinced it is erroneous. However, you should not be influenced to decide any question in a particular way because a majority of the jurors, or any of them, favor such a decision.

Ladies and gentlemen, the attitude and conduct of jurors at the beginning of their deliberations are matters of considerable importance. It is rarely productive of good for a juror at the outset to make an emphatic expression of his or her opinion on the case, or to state how he or she intends to vote. When one does that at the beginning, his or her sense of pride may be aroused and he or she may hesitate to change his or her position, even if shown that it is wrong. Remember, ladies and gentlemen, that you are not partisans or advocates in this matter, but are judges.

You shall now retire and select one of your number to act as foreperson who will preside over your deliberations. In order to make a determination as to the penalty to be imposed upon the defendant, to wit, William Arnold Proctor, all twelve jurors must agree.

[1562] Any verdict that you reach must be signed and dated by your foreperson on a form that will be provided and then you shall return with it to the courtroom.

When all twelve of you have agreed upon a verdict, all your foreperson will do will be to sign and date the particular verdict that you have all agreed upon. You can take the one which you find on arriving at your conclusion and return to court with the same.

I read the forms of verdict to you. The order in which they are read is of no significance. After the title of Court and cause, they are:

"We, the jury in the above-entitled cause, find that the aggravating circumstances outweigh the mitigating circumstances and therefore impose a penalty of death as a result of defendant's conviction of murder in the first degree with special circumstances found to be true relating to the death of Bonnie Stendal.

"We, the jury in the above-entitled cause, find that the mitigating circumstances outweigh the aggravating circumstances and therefore impose the penalty of confinement in the state prison for life without possibility of parole as a result of defendant's conviction of murder in the first degree with special circumstances found to be true relating to the death of Bonnie Stendal."

[1563] As indicated, in this case there are two possible verdicts. These two possible verdicts have been set forth in the instructions given to you and are set forth in the forms of verdict which you will receive. Only one of the possible verdicts may be returned by you. When you all have agreed upon one verdict, the corresponding form is the only verdict form to be signed. The other form is to be left unsigned.

Ladies and gentlemen, I wish to say from this time on you will receive no visitors from any source whatever. If in the course of your deliberation you have any matter that you desire to take up with the Court, you will notify the bailiff in charge, in writing, on the forms provided, who will bring you before the Court for that purpose. Ladies and gentlemen, the case now remains with you.

Mrs. Skaggs, will you kindly swear the bailiff, Officer Studybaker, to take charge of this

jury and the bailiff alone will take charge of them."

THE CLERK: Do you solemnly swear that you will take charge of the jury and keep them together, that you will not speak to them yourself nor allow anyone else to speak to them on any matter connected with this case and when they have reached a verdict, you will return them to this courtroom, so help you God?

THE BAILIFF: I will.

[1564] THE COURT: Ladies and gentlemen of the jury, will you kindly follow Officer Studybaker to your deliberating room. The evidence will be delivered to you shortly, as will the verdicts. Officer Studybaker has now received the forms that you are to use if you desire to contact the Court. The alternates will please remain.

Ladies and gentlemen, you may take your notebooks and your instructions with you.

(At 10:33 a.m. the jury retired to deliberate on a verdict.)

THE COURT: All right. The record will reflect the defendant is present along with respective counsel, that the alternates, Mrs. Lubiens, Mrs. McCormick and Miss Tripp are present.

Mr. Kennedy, will you stipulate along with your client, Mr. Proctor, that the alternates need not remain in the custody of the sheriff, so long as they are properly admonished and available in the court house?

MR. KENNEDY: I will so stipulate.

THE COURT: Is that agreeable with you, Mr. Proctor?

DEFENDANT: Yes, sir.

THE COURT: Mr. Carlton?

MR. CARLTON: Yes, your Honor.

THE COURT: Mrs. Lubiens, Mrs. McCormick and Miss Tripp, while the regular jurors deliberate, you are excused to return to the jury lounge or go elsewhere in the court house. However, you are not discharged as alternates in this case, but remain fully responsible to this Court as alternate jurors.

You shall remain on call and if called upon by this [1565] Court, you shall report here for the purpose of deliberating. You shall remain on call until such time as you are notified by me or by an officer of this Court that you are in fact discharged.

While you thus remain on call, you are again admonished that it is your duty not to converse among yourselves or with anyone else nor permit anyone else to speak to you on any subject matter connected with this trial, nor are you to express any opinion thereon until you are called upon to deliberate.

If you are approached or spoken to by anyone regarding this case, you shall immediately inform the Court of such fact.

You are further admonished that you are not to seek any information from any source with regard to this case, other than the evidence that you have heretofore heard. In addition, you are not to read any newspaper accounts

of [sic] listen to any radio broadcasts or television telecasts of accounts relating to this trial, murder trials in general or specific, or the penalty of life without possibility of parole in state prison or the death penalty.

You are further admonished that you are not to talk or communicate with any of the attorneys in this case prior to the rendition of a verdict beyond a casual word of greeting.

If you don't hear from us sooner, please return to this courtroom at five minutes to 12:00. We'll ask you to leave your notebooks and your instructions in your seat, you'll find them when you return.

* * *

(FURTHER INSTRUCTION (re jury inquiry))

[1579] (At 11:00 o'clock a.m. the following proceedings were had in open court in the presence of the defendant and counsel, out of the presence of the jury and alternates:)

THE COURT: All right. The record will reflect the defendant is present along with respective counsel, that we're outside the presence of the jury in the matter of the People of the State of California vs. William Proctor.

As the Court has informally advised respective counsel, the Court has received the following communication from the jury.

> "We, the jury in the above-entitled cause, request the following: Regarding page 2 of the instructions, the first sentence indicates 'conviction of murder in the first degree exclusive of special circumstances.' Was defendant in fact convicted of also burglary, rape and torture exclusive of their application as special circumstances? Please explain."

What the Court proposes to respond to the jury is as follows.

> "The answer to your inquiry is as follows: The defendant has heretofore been found guilty of burglary in the first degree and forcible rape as those offenses have been defined for you in the instructions which you have been given which you possess.
>
> "As to your inquiry with – regarding torture, the defendant was convicted of murder in the first degree. A person may be convicted of murder in the [1580] first degree based on any one or more of the three theories applicable to murder in the first degree upon which you have been instructed, to wit: A willful and deliberate premeditated killing of a human being with the specific intent to kill and express malice aforethought being present; 2. Under the felony murder rule; 3. Murder which is perpetrated by torture."

In response to Mr. Kennedy's request, there being no objection by Mr. Carlton, the Court will then read the following which is the instruction which we've designated as Instruction 3 which is a – which was given to the jury at the request of and with the stipulation of the People and the defendant which reads as follows:

> "The fact that William Arnold Proctor has been found guilty of murder in the first degree with special circumstances, and that the special circumstances were found to be true, does not in

and of itself constitute an aggravating factor or factors."

And I think what I'd like to do, if it's agreeable with counsel, is to change that to read in light of the inquiry of the jury,

"The fact that William Arnold Proctor has been found guilty of murder in the first degree with special circumstances, and that the special circumstances were found to be true, and the fact that William Arnold Proctor has been found guilty of burglary in the first degree and rape, do not [1581] in and of itself constitute an aggravating factor or factors.

"You must examine the evidence presented to you at this trial and you must be satisfied beyond a reasonable doubt that the defendant William Arnold Proctor committed the crimes including the circumstances thereof before you may determine whether or not the crimes and the circumstances thereof constitute an aggravating factor.

"Reasonable doubt is defined as follows: It is not a mere possible doubt because everything relating to human affairs and depending on moral evidence is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction to a moral certainty of the truth of the charge.

"You are further advised that the fact defendant has been found guilty of murder, burglary and rape may constitute an aggravating factor if you so determine in accordance with the

instructions given to you, but cannot be considered as an additional aggravating factor under the factor designated (b) in the instruction given to you found on page 4 of your instructions, to wit: (b) the presence or absence of criminal activity by the defendant which involved the use or attempted [1582] use of force or violence, or the expressed or implied threat to use force or violence."

For the record it's CALJIC 8.84.1(b).

Mr. Carlton, do you have any objection to the Court giving – responding to the jury's inquiry in the manner set forth in open court in your presence?

MR. CARLTON: None at all.

THE COURT: Mr. Kennedy, do you?

MR. KENNEDY: No, your Honor.

THE COURT: Is that agreeable with you, Mr. Proctor?

DEFENDANT: Sounds all right with me.

THE COURT: All right. Officer Freese, would you be so good as to notify Office McGuire to bring the jury in?

(The following proceedings were had in open court in the presence of the defendant and counsel, in the presence of the jury and alternates:)

THE COURT: Good morning again.

All right. The record will reflect the defendant is present along with respective counsel, that the ladies and

gentlemen of the jury are all present in their respective places, as are the alternates.

Will counsel stipulate that all jurors are present?

MR. CARLTON: Yes, your Honor.

THE COURT: The record will further reflect the jury has been returned to the courtroom as a result of the communication which the Court has received from the jury through the bailiff.

Mr. Burruel, the Court has received the following communication:

> [1583] "We, the jury in the above-entitled cause, request the following: Regarding page 2 of the instructions, the first sentence indicates 'conviction of murder in the first degree exclusive of special circumstances.' Was the defendant in fact convicted also of burglary, rape and torture exclusive of their application as special circumstances? Please explain." Signed by yourself and dated today.

Is that the communication which you have signed?

JUROR BURRUEL: Yes, it is.

THE COURT: Very well.

Ladies and gentlemen, the answer to your inquiry is as follows:

> "The defendant has heretofore been found guilty of burglary in the first degree and forcible rape as those offenses have been defined for you in the instructions which have been given to you and which you possess.

> "As to your inquiry regarding torture, the defendant was found guilty of murder in the first degree. A person may be found guilty of murder in the first degree based on any one or more of the – of the three theories applicable to murder in the first degree upon which you have been instructed, to wit: A willful and deliberate premeditated killing of a human being with the specific intent to kill and express malice aforethought being [1584] present; 2. Under the felony murder rule; 3. Murder which is perpetrated by torture.
>
> "Ladies and gentlemen, you are further advised in response to your inquiry the fact that William Arnold Proctor has been found guilty of murder in the first degree with special circumstances, and that the special circumstances were found to be true, and the further fact that William Arnold Proctor has been found guilty of burglary in the first degree and forcible rape, do not in and of themselves constitute an aggravating factor or factors. You must examine the evidence presented at this trial and you must be satisfied beyond a reasonable doubt that the defendant William Arnold Proctor committed the crimes including the circumstances thereof before you may determine whether or not the crimes and the circumstances thereof constitute an aggravating factor.
>
> "Reasonable doubt is defined as follows: It is not a mere possible doubt because everything relating to human affairs and depending on moral evidence is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the

jurors in that condition that they cannot say they feel an abiding conviction to a moral certainty of the truth of the charge.

"You are further advised that the fact that the defendant William Arnold Proctor has been found [1585] guilty of murder in the first degree, burglary in the first degree and rape may constitute an aggravating factor if you so determine in accordance with the instructions given to you but it cannot be considered or they cannot be considered as an additional aggravating factor under the factor designated (b) in the instructions given to you on page 4 of your instructions, to wit: the presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence, or the expressed or implied threat to use force or violence."

Ladies and gentlemen, that's the answer to the inquiry given to you and the explanation as you have requested. I'll now ask you to please follow Officer McGuire back to your deliberating room and resume your deliberations. Thank you.

(The following proceedings were had in open court in the presence of the defendant and counsel and the alternates, out of the presence of the jury:)

THE COURT: All right. The alternates please heed the admonition previously given to you. If you don't hear from us sooner please return at five minutes to 12:00. Thank you.

Madam Clerk, you will kindly file the note from the jury.

(The following proceedings were had in open court in the presence of the defendant and counsel, out of the presence of the jury and alternates:)

THE COURT: Either counsel wish to be heard? We're outside the presence of the jury and the alternates.

MR. KENNEDY: No, your Honor.

In the Superior Court of the State of California
In and For the County of Sacramento

The People of the State of California	)	CASE NUMBER 65383
	)	DEPT. NUMBER FIVE
vs.	)	**VERDICT**
WILLIAM ARNOLD PROCTOR	)	
_____	)	

We, the jury in the above-entitled cause, find that the AGGRAVATING CIRCUMSTANCES outweigh the mitigating circumstances and therefore impose the penalty of DEATH as a result of defendant's conviction of murder in the first degree with special circumstances found to be true, relating to the death of BONNIE STENDAL.

DATED: May 19, 1983 /s/ Armond R. Illegible
FOREPERSON

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

THE PEOPLE,	)	
Plaintiff and Respondent,	)	S004555/CR23185
v.	)	(Dec. 28, 1992)
WILLIAM ARNOLD PROCTOR,	)	
Defendant and Appellant.	)	
_____	)	

Following the guilt phase of a jury trial held in Shasta County, defendant William Arnold Proctor was found guilty of various offenses committed against Mrs. Bonita Stendal: first degree murder (Pen. Code, §§ 187, 189),[1] forcible rape (§ 261, subd. (2)), and first degree burglary (§ 460). The jury also found that defendant inflicted great bodily injury (§ 12022.8), and found true the special circumstance allegations that he committed the murder in the course of rape (§ 190.2, subd. (a)(17)(iii)), in the course of first degree burglary (§ 190.2, subd. (a)(17)(vii)), and with the infliction of torture (§ 190.2, subd. (a)(18)). After the court declared a mistrial as to the penalty phase of the trial, defendant's motion for change of venue was granted as to that phase, and after further proceedings a jury in Sacramento County imposed the death penalty. After denying defendant's

[1] All further statutory references are to the Penal Code unless otherwise indicated.

motion for modification of the verdict, the court sentenced defendant to death. This appeal is automatic. (§ 1239, subd. (b).) We affirm the judgment in its entirety.

FACTS

The evidence at trial established that on the evening of April 21, 1982, defendant entered the residence of Mrs. Bonita Stendal, a widow living alone, and sometime that evening or early the next morning, raped, tortured, and murdered her. Defendant then transported her body in the trunk of her automobile to a site near a lake 12 miles away, where he pushed the body off an embankment.

I. GUILT-PHASE EVIDENCE

A. The prosecution's case.

1. The crimes.

Mrs. Bonita Stendal, 55 years of age, lived on Ponderosa Street in Burney, a small mountain community located 35 miles east of Redding in Shasta County. Mrs. Stendal taught first grade students at the East Burney Elementary School. The last person (other than defendant) to see her alive on the evening of April 21, 1982, was a fellow schoolteacher, Robert Schmidt, who briefly spoke with her at the supermarket in Burney and then encountered her 10 minutes later at the nearby drugstore, approximately 7:50 p.m.

Later the same evening, Mrs. Stendal's neighbor, Patty Olinger, was seated in her automobile as it was being pushed through the intersection at Marquette and Ponderosa Streets, when she observed Mrs. Stendal's

muddy vehicle parked in the driveway of Mrs. Stendal's residence on Ponderosa Street.[2] During the two-year period of their acquaintance, Olinger had known Mrs. Stendal always to park her vehicle inside her garage and never in the driveway, and had known her always to keep her vehicle clean. Olinger observed the lights on inside Mrs. Stendal's residence at this time.

Approximately 8:55 a.m. the following morning, Dena Humble, the secretary at Mrs. Stendal's school, was notified that Mrs. Stendal had failed to arrive. Upon telephoning Mrs. Stendal's residence and receiving no response, she telephoned Mrs. Stendal's next-door neighbor and teaching assistant, who informed Humble she did not know where Mrs. Stendal was. Humble then proceeded to Mrs. Stendal's residence, letting herself in the unlocked door and walking through the house when no one responded to her knock. Humble noticed a fork was on the kitchen counter, and the oven door was open. Inside the garage, Humble noticed a light was on and both of Mrs. Stendal's automobiles were inside. Returning to school, Humble notified the police.

Approximately 9:30 that morning, Sergeant Larry Jarrett of the Shasta County Sheriff's Department conducted a brief search of the Stendal residence. He observed that the house was very neat overall. There was an open pickle jar and carving fork on the kitchen counter, and a drawer containing carving forks and large knives was

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[2] This witness testified she observed the vehicle in that condition and location, approximately 7:50 p.m. that evening. This reported time does not correlate with the testimony of other witnesses as to the relevant time periods.

partly open. In the bedroom, the bed was covered only by a sheet.

Sergeant Jarrett departed to report to his superior, Lieutenant Phil Eoff, and shortly thereafter, accompanied by Sergeant Michael Shaeffer, an officer specializing in evidence and identification, they searched the residence more thoroughly. This time, the officers noticed that the telephone lines leading to the kitchen and den telephones had been severed, and the drapes in the den had been pulled off the hooks at one end. The officers also observed that one of the two vehicles in the garage was muddy, water was dripping from its fender wells, and there were wipe marks across the entire outside lid of its trunk. After a locksmith opened the trunk, it was discovered that the items inside appeared to have been pushed into the outer edges of the trunk, and the dust inside recently had been disturbed.

At 4 p.m. that same day, April 22, 1982, newlyweds Robert and Susan Porter stopped their vehicle on the shoulder of the road near an embankment at Lake Britton, located 12 miles from Burney, in order to let out their dog and take a photograph of the scenery. When Robert Porter looked over the embankment, he discovered a body lying approximately 11 feet from the road. The couple telephoned law enforcement authorities and waited by the body for their arrival.

Sergeant Jarrett identified the body as that of Mrs. Stendal. It appeared to have been thrown from the roadway. Tire tracks of the same design as those made by the tires on Mrs. Stendal's automobile ran perpendicular to the road, and, from the tire tracks, drag marks led to the

top of the embankment. The body was clad in a nightgown pulled up to the waist, and an unknotted scarf was draped around the neck. A green electric blanket covered the body. The hands were tied behind the victim's back with four sets of ligatures, made of cloth and nylons, by means of various types of "half-hitch" knots. There were some cuts and "damage" to the face.

On the morning of April 23, Sergeant Jarrett, accompanied by Shaeffer and several other experts, returned to Mrs. Stendal's house in order to take photographs and obtain fingerprints. Beneath an area rug on the bedroom floor, they discovered a small pool of blood, still damp, which proved to be the same type as Mrs. Stendal's blood. Other bloodstains were located on the knob of the bedroom dresser.

That same day, the authorities brought several longtime acquaintances of Mrs. Stendal into the residence. These individuals observed that a brown or beige purse she frequently used was missing, and that certain circumstances, such as the unlocked front door and missing bedspread and blanket, were unusual because Mrs. Stendal always locked the residence and kept it very neat.

On April 24, Dr. Boyd Stephens of the San Francisco County Coroner's office performed an autopsy on the body. He estimated that Mrs. Stendal had been killed some time between the early evening hours of April 21 and the early morning hours of April 22. She was not killed at the location at which her body was found but had been transported there after death.

In Dr. Stephen's opinion, Mrs. Stendal's death was caused by asphyxiation, initiated by nonfatal manual

strangulation and later by ligature strangulation. The face had suffered numerous cuts and bruises from a blunt force. The eyes were swollen shut and the nose and lips also were swollen. Dr. Stephens believed that most of these injuries resulted from seven to nine blows. There were various internal injuries in the area of the neck. There were a number of shallow stab wounds and incisions caused by dragging a weapon across the skin in the area of the neck. The curvature of some of the injuries indicated they had been inflicted slowly and deliberately. There were seven wounds less than two inches deep to the area of the right breast which had been inflicted while Mrs. Stendal still was alive but unable to move away from her assailant. In Dr. Stephens' opinion, these wounds were inflicted for the purpose of causing pain or fear.

Prior to death, Mrs. Stendal had suffered four stretching injuries on the labia and a fifth injury which extended into the opening of the vagina. In the coroner's opinion, four of these probably were caused by a foreign object, and the fifth, probably by a penis. There was no semen inside or on the body.

Also while alive, Mrs. Stendal had received a blunt-force injury to the area of her right kidney. There also were blunt-force injuries to her left foot. The ligatures used to tie her hands were tied so tightly they had cut into her wrists. There were post-mortem abrasion injuries attributed to dragging the body.

On April 30, the officers returned to the Stendal residence to perform a systematic investigation. On this occasion, they noticed small amounts of blood on the

bedroom nightstand. After dismantling and removing the bed, they found, near the location of the head of the bed, approximately one dozen pamphlets. Some of the pamphlets had blood on them and one appeared to contain a bloody palm print. Other latent palm prints were obtained from the booklets. The blood on some of the pamphlets later was identified as being of the same type as Mrs. Stendal's. The door to the master bedroom on the side facing the den appeared to have been wiped with a damp, dirty rag.

On May 2, Sergeant Jarrett returned to the residence and noticed a cigarette butt from an unfiltered cigarette lying outside a window of the residence; there were also indications a hand had been on the window sill (although no fingerprints could be obtained).

2. Evidence of defendant's involvement.

In view of the circumstantial nature of the evidence connecting defendant to the commission of the crimes, and the nature of the defense that was presented at trial, we consider it necessary to set forth in substantial detail the evidence relating to defendant's activities immediately preceding and following the commission of the murder.

Mrs. Stendal's son David (who was approximately 21 years of age at the time of trial) had lived with Mrs. Stendal until 1979, when he moved to Chico. David had known defendant (20 years of age at the time of trial) and Robert Manley (26 years of age at the time of trial) for several years and often had smoked marijuana with them.

David had concealed marijuana in various locations within the Stendal residence until sometime in 1979 or 1980. Manley resided with his mother, Neta Manley, less than one block from the Stendal residence.

From February 18, 1981, to April 9, 1982, defendant was not present in the Burney area. In late January 1982, defendant commenced a four-week general truck-driving course at Western Truck School, where he received instruction in tying knots. Students at the school were taught to tie several types of trucker's-knots, which knots were identical to those found on the ligatures used to bind Mrs. Stendal's wrists.

Approximately two weeks prior to the murder of Mrs. Stendal, defendant returned to live with his mother and two brothers in Burney. In the early morning hours of either Friday or Saturday, April 16 or 17, defendant and Robert Manley made four or five obscene or "crank" telephone calls from the Manley residence to various Burney residents. Robert Manley telephoned Mrs. Stendal and told her he would like to have sexual relations with her. Defendant made a separate obscene telephone call to an unnamed person.

On April 21, 1982, defendant hitchhiked to the Manley residence, arriving approximately 2 p.m. Mrs. Manley returned from work at 3 p.m. Prior to 5 p.m., Mrs. Manley drove defendant to a market in Burney to purchase liquor. When they returned to the Manley residence, the three had a drink and then ate dinner at 5 p.m. Approximately 5:30 p.m., defendant and Robert Manley walked to a local convenience store, where Manley purchased two packs of unfiltered Camel cigarettes (the brand and

type they both smoked), giving one pack to defendant. They returned to the Manley residence to drink and watch a baseball game on television, and remained there after Mrs. Manley departed at 7 p.m. Defendant had three or four drinks. The baseball game commenced approximately 7:35 p.m. Between 8 p.m. and 8:30 p.m., defendant telephoned his mother to report he was at the Manley residence and intended to remain there for the night.

Approximately 8:30 p.m. defendant departed, informing Robert Manley that he was going to one of the local bars to "pick up" a woman and would return later to spend the night. When he left, defendant was wearing thongs, white socks, blue jeans, a blue shirt, and a gold-colored windbreaker borrowed from Robert Manley, because defendant did not have his own jacket with him. Shortly after 8:30 p.m., defendant arrived at the residence of his friend Jeffrey Bohall, who lived five to six blocks from the Manley residence and four to five blocks from the Stendal residence. Defendant remained at that location until sometime before 10 p.m., when he departed in order to have a few drinks and "get a piece of butt." Defendant inquired whether Bohall wanted to accompany him but Bohall declined. Bohall's mother, Juanita Bohall, who was home during defendant's visit, testified that defendant was wearing blue jeans and an off-white or cream-colored lightweight jacket with a rust-brown trim. She could not clearly remember his shoes but thought they were light weight.

When Mrs. Manley returned to her residence between 10:30 p.m. and 11 p.m. that evening, defendant was not present. When Robert Manley retired at 2:30 a.m.

after watching the baseball game and a late-night movie, defendant still had not returned. When Mrs. Manley left for work between 5:30 and 6 a.m., defendant was not at the Manley residence. According to defendant's mother, Julia Proctor, defendant did not return to the Proctor residence during the night of April 21.

After sunrise, at 5:30 a.m. on the morning of April 22, defendant's aunt, Sharon Palkki, observed defendant walking across the street in front of Palkki's residence, which was located approximately 500 feet from Mrs. Stendal's residence, several miles from defendant's residence in Johnson Park on the outskirts of Burney. Defendant was wearing loose-fitting blue jeans, white socks, and sandals, and what appeared to be a pair of gloves was dangling from his right pants pocket. Between 6 a.m. and 7 a.m., defendant telephoned his brother, Ed Proctor, instructing him to have their mother give defendant a ride home from the local market. Another witness observed defendant telephoning from that location during the same time period. When defendant's mother picked him up, defendant was wearing blue jeans and a gold-colored windbreaker, which she did not recognize. His mother did not remember the type of footwear defendant was wearing but testified he owned a pair of thongs.

Approximately 11:30 a.m. on April 22, Robert Manley arose and telephoned defendant, who informed Manley that defendant had seen his (defendant's) mother downtown the previous evening and had driven home with her. When Robert Manley asked defendant whether he had watched the baseball game, the late-night movie, or any other television program at home, defendant responded he had not, and stated he was tired and

wanted to sleep. Defendant agreed to meet Robert Manley after doing defendant's laundry. Later that day, Robert Manley and his mother drove to the Proctor residence, where they picked up defendant. They proceeded to Redding in order to purchase tickets to a concert. Defendant returned Robert Manley's jacket at that time, and Manley observed it was cleaner than it had been when he had given it to defendant the previous evening. After being dropped off and obtaining the tickets, Robert Manley and defendant met two women and spent the night with them at a motel in Redding.

On the morning of April 23, Shasta County officers brought defendant and Robert Manley to the sheriff's station for questioning. Defendant told Sergeant Jarrett that he had been at Robert Manley's residence until 8:30 p.m. on April 21 and then had gone into Burney. Defendant stated he had received a ride home that evening from an unidentified man in a pickup truck. At his residence, defendant had sharpened some knives for his mother, and had been home several hours before retiring at 11 p.m. Defendant did not arise until 9 a.m. on April 22, and did not leave the residence until after 3 p.m., when he went to Redding with Robert Manley and spent the night at a motel. Defendant showed Jarrett a motel room receipt, which defendant volunteered he had kept "for an alibi in case anything flared up." Defendant denied having visited Mrs. Stendal's residence.

Defendant was placed in custody for a parole violation he admitted to the officers. One of the officers observed that defendant had suffered abrasions below each knee, and that there were what appeared to be five or six somewhat parallel scratch marks above defendant's

right knee. On April 24, Dr. Stephens examined defendant's leg injuries and determined they probably were two days old, and had not been sustained through any layers of clothing but rather while defendant's legs were uncovered. The injuries were similar to injuries Dr. Stephens had observed in other sexual assault cases.

On May 1, Mrs. Proctor visited defendant in custody and afterward informed one of the detectives that her son had asked her to tell Sergeant Jarrett that he had been at home on the night of the murder. When Mrs. Proctor had advised defendant she already had told Jarrett otherwise, defendant asked her to tell Jarrett that defendant had been at a party that evening.

The bloody palm print obtained from one pamphlet proved to match defendant's palm print, and the other, latent palm prints obtained from the booklets also matched defendant's palm prints. A very faint print from footwear was found at the location where the body was discovered and proved to be similar in design to the tread of a pair of thongs recovered from defendant's possession. On May 2, defendant was placed under arrest for the murder of Mrs. Stendal.

B. The defense case.

Defendant had known Robert Manley for several years prior to the murder. He testified he was acquainted with David Stendal, had known Mrs. Stendal approximately three to four years, and had been inside the Stendal residence on twenty or thirty occasions. Defendant testified that Manley and David Stendal had used marijuana and amphetamines on many occasions, and

Manley had broken into the Stendal residence on at least two prior occasions. A defense investigator testified that Manley had informed him that one of the entries had been for the purpose of locating drugs.

Defendant testified that, after drinking the previous evening, he had awakened on the Monday or Tuesday morning prior to the day of the murder, with the bruises on his legs which the officers later had noticed. Defendant further testified that on the afternoon of April 21, 1982, he and Manley drank whiskey mixed with cola at the Manley residence. Defendant and Manley wanted to attend a concert in Chico, and Manley began to talk of retrieving various drugs which he knew David Stendal had secreted in the Stendal residence, and which defendant believed Manley intended to sell in order to raise money to purchase the tickets. After having two or three drinks, defendant left the Manley household shortly after 8:30 p.m. and proceeded to Jeffrey Bohall's residence, where he remained until 9:30 or 10 p.m. After Bohall refused to accompany defendant to "party," defendant left on foot to purchase Camel Light, filtered cigarettes (his brand and type) at a liquor store. The walk to the store took him one and one-half hours, and he returned to Manley's residence approximately midnight.

Upon arriving, defendant was unable to locate Manley and retired to an upstairs bedroom. Defendant awoke several hours later, at dawn on April 22. Defendant could not find Manley, but at this time discovered a note addressed to defendant on the side of the dresser, notifying him that Manley had departed to "check Stendal's stash" and would return shortly. Defendant decided to follow Manley to the Stendal residence.

When defendant arrived, the garage door was open but Mrs. Stendal's automobile was not inside the garage. The lights were turned on in the front room, and after no one responded to his knock, defendant entered through the unlocked sliding glass door. Defendant did not locate either Robert Manley or Mrs. Stendal, but noticed a puddle of blood next to the bed that he "just kind of tested" by touching it with the back of his hand. He noticed some pamphlets between the bed and a nightstand but did not recall touching the pamphlets upon which his palm prints later were detected. Defendant immediately ran out the back door to the market, where he telephoned his mother to ask that she pick him up. At home, defendant slept for several hours and telephoned Robert Manley approximately 1:30 p.m. on April 22. He did not launder his clothing.

After defendant and Manley were dropped off in Redding by Manley's mother, Manley told defendant that the previous evening, Mrs. Stendal had become ill and Manley had driven her to the hospital. Manley could not explain to defendant why there was blood on the floor of the Stendal residence.

The jury found defendant guilty of first degree murder, rape, and burglary, with an enhancement for great bodily injury, and found true the three charged special-circumstance allegations. After the jury could not agree as to penalty, a mistrial was declared. Defendant renewed his motion for change of venue, which was granted, and retrial of the penalty phase was conducted in Sacramento County.

II. PENALTY-PHASE EVIDENCE

A. The prosecution's case.

The prosecution presented evidence to the Sacramento County jury substantially similar to the evidence presented to the Shasta County jury, including the following: that Mrs. Stendal was last seen alive shortly before 8 p.m. on April 21, 1982; that when she failed to appear the following day for school, a brief search commenced; that the body was discovered on April 22, 1982; and that subsequent forensic examination of the body revealed the injuries described above. The evidence obtained at Mrs. Stendal's residence was presented, as was the testimony of Mrs. Manley and Robert Manley concerning defendant's actions and whereabouts on the evening of the murder. The two witnesses who had observed defendant near the murder scene early on the morning of April 22, 1982, testified. The prosecution presented the evidence of defendant's familiarity with trucker's-knots. In addition, the prosecutor and defense counsel stipulated that in 1980 and 1981, defendant had suffered two second degree burglary convictions, and in 1981 also had been convicted of vehicle theft.

B. The defense case.

The defense presented two witnesses. Defendant's brother Ed testified that defendant did not have difficulty getting "dates." At 9 a.m. on April 22, 1982, Ed returned from a trip to find defendant at the Proctor residence. From that time until 12 p.m., defendant helped Ed repair a vehicle. Defendant did not wash his clothes that morning.

Defendant's mother testified that defendant's father left the family in 1981. Defendant had dropped out of high school after his sophomore year. Defendant's mother characterized him as a follower who was easily led. Defendant's mother had not known him to be hostile or disrespectful to women in general, or to say anything derogatory about Mrs. Stendal in particular.

At the conclusion of the penalty phase, the jury fixed the penalty at death.

DISCUSSION

I. GUILT-PHASE ISSUES

A. Motion for change of venue.

Defendant contends the trial court erred in denying his repeated motions for change of venue.[3] Pursuant to section 1033, subdivision (a), the court must grant a motion for change of venue if "there is a reasonable likelihood that a fair and impartial trial cannot be had in the county." The phrase "reasonable likelihood" in this context "means something less than 'more probable than not,' " and "something more than merely 'possible.' " (*People v. Bonin* (1988) 46 Cal.3d 659, 673.) In ruling on

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[3] After entering a plea of not guilty on August 2, 1982, defendant on September 14, 1982, moved for a change of venue, which motion was denied summarily on September 23, 1982, on the ground the motion did not comply with California Rules of Court, rule 841. On October 8, 1982, defendant filed a second motion to change venue, which the court considered and denied on October 20, 1982. On December 7, 1982, defendant renewed his motion for change of venue, which was heard and denied on that date.

such a motion, as to which defendant bears the burden of proof, the trial court considers as factors the gravity and nature of the crime, the extent and nature of the publicity, the size and nature of the community, the status of the victim, and the status of the accused. (*People v. Edwards* (1991) 54 Cal.3d 787, 807; *People v. Cooper* (1991) 53 Cal.3d 771, 805; *People v. Bonin, supra*, 46 Cal.3d 659, 672-673.)

"On appeal after a judgment following the denial of a change of venue, the defendant must show both that the court erred in denying the change of venue motion, i.e., that at the time of the motion it was reasonably likely that a fair trial could not be had, and that the error was prejudicial, i.e., that it [is] reasonably likely that a fair trial was not *in fact* had. [Citations.]" (*People v. Edwards, supra*, 54 Cal.3d 787, 807, italics added; *People v. Cooper, supra*, 53 Cal.3d 771, 805-806.)

With regard to the first part of the showing required of a defendant on appeal, we employ a standard of de novo review to the trial court's ultimate determination of the reasonable likelihood of an unfair trial. (*People v. Edwards, supra*, 54 Cal.3d 787, 807; *People v. Cooper, supra*, 53 Cal.3d 771, 805-806; *People v. Bonin, supra*, 46 Cal.3d 659, 676-677.) This requires our independent determination of the weight of the five controlling factors described above. (*People v. Bonin, supra*, 46 Cal.3d 659, 676-677; *People v. Balderas* (1985) 41 Cal.3d 144, 177.) With regard to the second part of the showing, in order to determine whether pretrial publicity had a prejudicial effect on the jury, we also examine the voir dire of the jurors. (*People v. Howard* (1992) 1 Cal.4th 1132, 1167; *People v. Anderson* (1987) 43 Cal.3d 1104, 1131; *People v. Balderas, supra*, 41 Cal.3d 144, 177.)

Although defendant was charged with very serious offenses, every capital case presents a serious charge. This factor adds weight to a motion for change of venue but is not dispositive. (*People v. Howard, supra,* 1 Cal.4th 1132, 1167; *People v. Cooper, supra,* 53 Cal.3d 771, 806; *People v. Balderas, supra,* 41 Cal.3d 144, 177.) The nature of the acts committed upon the victim is a factor that would tend to support a change of venue, but not to the degree of a case involving serial murders, for example. (Compare *People v. Jennings* (1991) 53 Cal.3d 334, 360.)

Defendant urges that the second factor, the nature and extent of pretrial publicity, virtually compelled a change of venue. In support of his renewed motion, defendant produced copies of articles appearing in two newspapers (six in the Inter-Mountain News, and approximately twenty in the Redding Record Searchlight, between April 1982 and August 1982) and more than sixty copy-notes from local television or radio broadcasts which aired during the same period. Many of these news reports detailed the condition in which Mrs. Stendal's body was found and the circumstances of her death; several included the circumstance that defendant's palm print had been found at the murder scene, and several reported that the prosecutor intended to seek the death penalty because of the heinous nature of the crime.

The defense also produced the results of a telephone public-opinion survey conducted on September 21 and 22, 1982. The survey revealed that of 169 persons contacted, 136 (or 80 percent of those contacted) had heard of the case; 94 (or 55 percent of those contacted) had heard of an arrest having been made; 52 (or 31 percent of those contacted) had formed an opinion as to defendant's guilt,

and (of those 52) 38 persons (or 70 percent) had formed their opinion from reading the Record Searchlight and 5 other persons had formed their opinion from reading the Inter-Mountain News.

Defendant urges that the results of the survey compelled a change of venue. The degree of exposure indicated by the survey, however, was not greater than in other cases in which a change of venue has not been required. (See, e.g., *People v. Jennings, supra,* 53 Cal.3d 334, 359, 361 [72 percent recalled the offenses and 31 percent believed there was a very strong case against the defendant]; *People v. Coleman* (1989) 48 Cal.3d 112, 135 [46.3 percent recalled the crime and 31.4 percent believed the defendant was probably or definitely guilty].)

An additional consideration is that the impact of the publicity may be mitigated due to the lapse of time between publication or issuance of news reports and commencement of jury selection. (E.g., *People v. Jennings, supra,* 53 Cal.3d 334, 361 [Publicity eleven months prior to trial did not require change of venue]; *People v. Anderson, supra,* 43 Cal.3d 1104, 1130 [danger of prejudice significantly reduced with lapse of five months]; *People v. Welch* (1972) 8 Cal.3d 106, 113-114 [news reports ending just over one month prior to trial did not require venue change].) Passage of time weighs against a change of venue. (*People v. Edwards, supra,* 54 Cal.3d 787, 808.)

In the present case, the lapse of nearly three months between the issuance of the last report on August 17, 1982, and the commencement of jury selection on November 10, 1982, helped dispel the potentially prejudicial effect of the news reports of the killing. Although the

extent and content of the pretrial publicity indicates a potential for prejudice, the circumstances that the reports had abated in the months preceding the trial, and that trial was held in Redding (35 miles from Burney), a larger community not the locus of the crime, lead us to conclude that a change of venue based upon pretrial publicity was not strongly indicated.

The next factor to be considered is the size of the community. " 'The larger the local population, the more likely it is that preconceptions about the case have not become imbedded in the public consciousness.' [Citation.]" (*People v. Jennings, supra,* 53 Cal.3d 334, 363.) The size of the county by itself is not determinative; rather, the critical factor is whether it can be shown that the size of the population is large enough to neutralize or dilute the impact of adverse publicity. (*Ibid.*)

Defendant's trial took place in late 1982. Shasta County, which encompasses 3,850.2 square miles (State of Cal., Cal. Statistical Abstract (1984) table A-1, p. 2), then had a population of approximately 122,100, ranking it 28th out of 58 counties in the state (State of Cal., Cal. Statistical Abstract, *supra,* table B-3, p. 15). As defendant has pointed out, cases involving counties with populations of similar size more frequently have occasioned venue changes than cases involving more populous counties. (See *People v. Balderas, supra,* 41 Cal.3d 144, 178-179.) We do not agree with the suggestion, however, that every case involving the death penalty merits a change of venue if it arises in a county of this size. Therefore, although this factor weighs somewhat in favor of a change of venue, it is not determinative.

The fourth and fifth factors are the respective status and prominence of the defendant and his victim. In the town of Burney, Mrs. Stendal was a well-known and apparently well-liked active participant in the community, had 20 years' experience in the Burney school system, and was described as having "taught everyone's kids." It does not appear that she had any particular prominence or status in the greater-county area outside the small, isolated town (Burney then had a population of approximately 3,000) in which she lived. Defendant also was a long time resident of Burney, whose ties to the community were interrupted only by the fairly brief periods he spent at California Youth Authority facilities. Although he previously had been convicted of several nonviolent felony offenses, and news accounts after the murder reported his prior confinement at the California Youth Authority on a burglary commitment, he was by no means a stranger to, or friendless in, the community (see *People v. Balderas, supra,* 41 Cal.3d 144, 179), and the degree of his prior criminal involvement does not appear to have earned him any great notoriety even in the small community of Burney. Although the respective positions of the victim and defendant within the community might lend support for a change of venue, this factor does not weigh heavily in favor of a change of venue.

Considered in total, the above described factors do not strongly weigh in favor of or against a change, but simply indicate a venue change might have been desirable. It appears that, although he established the possibility of an unfair trial in this venue, defendant failed to carry his burden of proving there was a reasonable likelihood that jurors drawn from Shasta County would have

formed such fixed opinions as a result of the pretrial publicity that they could not make the required determinations with impartiality. (See *People v. Bonin, supra,* 46 Cal.3d 659, 678.)

Considering the relative closeness of the issue, however, we turn next to the question whether any error in the trial court's ruling – that defendant did not carry his burden – would be prejudicial, that is, whether the record demonstrates a reasonable likelihood he did not in fact receive a fair trial. With this purpose in mind, we consider the jury voir dire to determine whether the jurors may have been prejudiced by the pretrial publicity surrounding the case, bearing in mind that no presumption of a deprivation of due process of law arises from juror exposure to publicity concerning the case. (*People v. Daniels* (1991) 52 Cal.3d 815, 853.)

In *People v. Cooper, supra,* 53 Cal.3d 771, prejudice was not shown where only three jurors had been exposed to " 'prejudicial information' " concerning the case and on examination all the jurors had stated they could be fair. (*Id.*, at p. 807.) In *People v. Jennings, supra,* 53 Cal.3d 334, prejudice was not established where voir dire of the selected jurors demonstrated they were not "tainted" by the modest pretrial publicity. (*Id.*, at p. 363.) In *People v. Bonin, supra,* 46 Cal.3d 659, prejudice was not demonstrated where even though prior to trial 10 of the 12 jurors and 3 of the 4 alternates had been exposed to news coverage, most had received indirect and minimal exposure. (*Id.* at p. 678.) In *People v. Anderson, supra,* 43 Cal.3d 1104, no prejudice was found where eight of the selected jurors had no knowledge of the facts or the issues, three of the others had read little about the case, one recalled

the case in general terms but in none of its details, and each juror stated he or she had formed no opinion and could and would reach a decision based on the evidence presented at trial. (*Id.*, at p. 1131.) In *People v. Balderas, supra,* 41 Cal.3d 144, no prejudice was demonstrated where six of the selected jurors professed pretrial ignorance of the case, four recalled reading reports, but none had followed the case or recalled many details. All of the selected jurors stated they could set aside any impressions obtained outside the courtroom and could consider the evidence without being prejudiced by the pretrial publicity. In *People v. Welch, supra,* 8 Cal.3d 106, each of the selected jurors was unfamiliar with the facts, had not formed any opinion of the defendant's guilt or innocence, or stated he or she could act fairly and impartially. (*Id.*, at p. 114.)

In the present case, defendant points out that all but three jurors had watched on television, heard on the radio, or read in the newspapers something concerning the case. Our review of the record reveals, however, that most of those jurors had received only minimal pretrial exposure to the case, that such exposure took place during a period well before commencement of the trial, that the jurors had not been informed of the evidence linking defendant to the case but only that the murder had occurred, and that when questioned on the subject, all of these jurors attested to their ability to put aside everything they had learned about the case and to decide the issues based solely on the evidence presented at trial.

We also observe that, in renewing the motion upon completion of jury selection, defendant did not rely upon the substance of the answers actually given in voir dire to

contend the jurors had formed opinions based upon pretrial publicity; defendant, in fact, acknowledged the assurances of the jurors that they would put aside any prior knowledge of the case. Rather, defendant only reiterated the point made earlier that, based on the percentage of persons answering defendant's telephone poll who indicated they had formed an opinion, it was reasonably likely some of those who actually served on the jury also had formed an opinion, no matter what their responses had been in the voir dire on this subject.

Finally, defendant urges that the circumstance that the trial court granted his motion for a change of venue prior to retrial of the penalty phase suggests the trial court belatedly recognized the true potential for prejudice. The record demonstrates, however, that upon defendant's renewal of his motion at the conclusion of the first trial of the penalty phase, the court expressly granted the motion on the ground that there had been intensive *additional* publicity during the entire guilt and penalty phases of the trial, which the media had attended on a daily basis, and therefore the likelihood of a fair trial in the county had *diminished*.

Having considered the totality of the evidence, we conclude defendant has not met his burden on appeal of demonstrating both that it was reasonably likely he could not receive a fair trial in Shasta County absent a change of venue, and that it was reasonably likely he did not in fact receive a fair trial. Therefore, reversal is not required.

B. Sufficiency of the evidence.

1. First degree murder.

In support of the allegation of first degree murder, the prosecution proceeded upon three alternate theories: premeditation and deliberation, torture murder, and felony murder (based upon the commission of rape and burglary). According to defendant, his guilt was not proved under any of these theories.

Having reviewed the entire record in the light most favorable to the judgment and presuming the existence of every fact the trier of fact reasonably could have deduced from the evidence, we conclude that a rational trier of fact could have found beyond a reasonable doubt the essential elements of defendant's guilt under each of these theories of first degree murder. (*People v. Pensinger* (1991) 52 Cal.3d 1210, 1237; *People v. Johnson* (1980) 26 Cal.3d 557, 576.)

a. Premeditation and deliberation.

In a case, such as the present one, based upon circumstantial evidence, we must decide whether the circumstances reasonably justify the findings of the trier of fact, but our opinion that the circumstances also might reasonably be reconciled with a contrary finding would not warrant reversal of the judgment. (*People v. Perez* (1992) 2 Cal.4th 1117, 1124.)

In order to ascertain whether the evidence is sufficient to sustain a finding of first degree murder based upon premeditation and deliberation, we generally examine whether there is evidence of planning, motive, or

method, although these factors are not exclusive. (*People v. Perez, supra,* 2 Cal.4th 1117, 1125; *People v. Thomas* (1992) 2 Cal.4th 489, 517; *People v. Raley* (1992) 2 Cal.4th 870, 887; *People v. Edwards, supra,* 54 Cal.3d 787, 813-814.) When the record discloses evidence in all three categories, the verdict generally will be sustained. Otherwise, convictions for first degree murder typically have been upheld where there is " 'either very strong evidence of planning, or some evidence of motive in conjunction with planning or a deliberate manner of killing.' [Citations.]" (*People v. Raley, supra,* 2 Cal.4th 870, 887.)

Our review of the record reveals evidence falling within all three categories. With respect to planning, the evidence (the unfiltered cigarette butt found near a window and a handprint on the windowsill) supports an inference defendant spent a period of time just outside Mrs. Stendal's residence observing her, before entering to commit the offenses. Once inside, defendant rendered the victim subject to his complete control by tying her hands and cutting the telephone lines. After binding the victim, defendant had a significant period of time in which to contemplate and plan her eventual death as he engaged in various acts of torture. (See *People v. Raley, supra,* 2 Cal.4th 870, 887.)

Although evidence of defendant's motive is less clear, a rational trier of fact could have determined that defendant's motive in murdering Mrs. Stendal was to avoid detection for the sexual and other physical abuses he had committed against her. (See *People v. Perez, supra,* 2 Cal.4th 1117, 1126; *People v. Raley, supra,* 2 Cal.4th 870, 887; *People v. Turner* (1990) 50 Cal.3d 668, 688.)

Finally, the manner of killing supports a finding of premeditation. The evidence establishes that defendant sequentially strangled the victim – first manually, and then by means of ligature – after subjecting her to prolonged physical abuse through the infliction of various types of wounds, some of which were not random. During the infliction of these wounds, defendant could have quickly dispatched the victim by means of stabbing and beating, had he chosen to do so. These circumstances do not suggest an unreflecting explosion of violence, but rather a preconceived design to kill the victim by the particular means chosen, and to prolong her agony in the process. (*People v. Edwards, supra,* 54 Cal.3d 787, 814; see *People v. Raley, supra,* 2 Cal.4th 870, 887.) Therefore, we conclude the evidence, although circumstantial, affords an adequate foundation for an inference of premeditation and deliberation, and is sufficient to support such a conclusion by a rational trier of fact.

b. Torture murder.

The evidence also is sufficient to support the finding that defendant killed the victim with the intent to torture her. " 'Torture murder is "murder committed with a wilful, deliberate and premeditated intent to inflict extreme and prolonged pain." [Citation.]' " (*People v. Raley, supra,* 2 Cal.4th 870, 888, quoting *People v. Pensinger, supra,* 52 Cal.3d 1210, 1239.) Such intent, considered sufficiently culpable to warrant punishing the perpetrator for first degree murder, is the calculated intent to cause pain for " ' "the purpose of revenge, extortion, persuasion or for any other sadistic purpose." ' " (*People v. Raley, supra,*

2 Cal.4th 870, 888, quoting *People v. Wiley* (1976) 18 Cal.3d 162, 168; see also *People v. Bittaker* (1989) 48 Cal.3d 1046, 1101; *People v. Davenport* (1985) 41 Cal.3d 247, 267.) "However, there must be a causal relationship between the torturous act and death, as Penal Code section 189 defines the crime as murder 'by means of' torture. [Citation.]" (*People v. Pensinger, supra*, 52 Cal.3d 1210, 1239, quoting *People v. Davenport, supra*, 41 Cal.3d 247, 267.)

Defendant, relying upon the evidence that the numerous "drag" knife wounds across the victim's chest apparently were not inflicted for the purpose of causing death and did not cause death, asserts that no causal relationship exists between these torturous acts and Mrs. Stendal's death. This assertion ignores the additional evidence that her death was caused by manual and ligature strangulation after she not only had been bound, beaten, and stabbed in the manner just described, but also had received a series of additional injuries (described more fully below), inflicted over her entire body. The finding of murder-by-torture encompasses the totality of the brutal acts and the circumstances which led to the victim's death. (*People v. Talamantez* (1985) 169 Cal.App.3d 443, 456; see also *People v. St. Joseph* (1990) 226 Cal.App.3d 289, 297; *People v. Hindmarsh* (1986) 185 Cal.App.3d 334, 349.) The acts of torture may not be segregated into their constituent elements in order to determine whether any single act by itself caused the death; rather, it is the continuum of sadistic violence that constitutes the torture. (*People v. Talamantez, supra*, 169 Cal.App.3d at p. 456.)

In the present case, the victim was subjected to strangulation by two different methods, her wrists were bound

so tightly as to cut into her skin, she was beaten in the face severely enough to have caused her eyes to be swollen shut and her lips to be swollen, she received severe blows to other parts of her body, and she suffered repeated, incision-type stab wounds to her neck, chest, and breast area. We conclude that this evidence amply supports the finding that Mrs. Stendal's death was brought about by torture.

Defendant additionally contends the trial court erred in instructing the jury pursuant to the then-current version of CALJIC No. 8.24,[4] because the evidence did not establish that the torture caused the victim's death. As explained above, there was ample evidence to demonstrate that the murder was accomplished by means of torture. Thus, the trial court did not err in giving this instruction.

Although it is in the context of his challenge to the sufficiency of the evidence to support the torture-murder special-circumstance finding that defendant also questions the sufficiency of the evidence to establish the *intent* to torture, for the sake of convenience we review this related claim at this point in our opinion, because intent to torture also must be present in order to sustain a conviction of first degree murder on a theory of torture

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[4] The version of CALJIC No. 8.24 (Cal. Jury Instns., Crim. (4th ed. 1979)), as read to the jury, provided in pertinent part: "The essential elements of [torture] murder are one, the act or acts which caused the death must involve a high degree of probability of death, and two, the defendant must commit such act or acts with the intent to cause cruel pain and suffering for the purpose of revenge, extor[t]ion, persua[s]ion or for any sadistic purpose."

murder. Again relying exclusively on the evidence of "drag" marks on the victim's chest, defendant urges that the specific intent to torture may not be inferred solely from the condition of the victim's body, because even severe wounds may be as consistent with "an explosion of violence" as with torture. (*People v. Mincey* (1992) 2 Cal.4th 408, 432; *People v. Raley, supra,* 2 Cal.4th 870, 888; *People v. Davenport, supra,* 41 Cal.3d 247, 268.) Intent is a state of mind which, unless established by the defendant's own statements, must be proved by the circumstances surrounding the commission of the offense (*People v. Mincey, supra,* 2 Cal.4th 408, 433; see also *People v. Pensinger, supra,* 52 Cal.3d 1210, 1239), which include the severity of the victim's wounds. (*People v. Mincey, supra,* 2 Cal.4th 408, 433.)

In the present case, the coroner testified that many of the victim's wounds, particularly the knife "drag" marks, were inflicted while she still was alive but after she had been rendered incapable of avoiding further attack. The wounds revealed that a relatively slow, methodical approach had been employed in their infliction, rather than their having resulted from sudden, explosive violence. The nature of many of the wounds, including the repeated blows to the face and to other parts of the body, as well as the knife "drag" marks, suggests that they were administered over a substantial period of time and that defendant intended to inflict cruel pain and suffering on the victim. Considered with the circumstances that the victim was isolated and prevented from resisting or escaping during these acts, this evidence establishes defendant's intent to torture the victim.

c. Felony murder.

The evidence also is sufficient to support a finding of first degree murder based upon the theory of felony murder, whether the underlying felony is considered to be rape or burglary. "We have required as part of the felony-murder doctrine that the jury find the perpetrator had the specific intent to commit one of the enumerated felonies, even where that felony is a crime such as rape. [Citations.]" (*People v. Hernandez* (1988) 47 Cal.3d 315, 346.) It also is established that the killing need not occur in the midst of the commission of the felony, so long as that felony is not merely incidental to, or an afterthought to, the killing. (*Id.*, at p. 348; see *People v. Hayes* (1990) 52 Cal.3d 577, 631.)

Defendant urges that the only items of evidence linking him to the commission of the rape are the unfiltered cigarette butt found near the residence, his presence in the residence on the night in question, and certain marks on his legs which an expert opined were similar to marks seen on other perpetrators of sexual assaults. Defendant ignores the additional circumstantial evidence that a short time prior to the commission of the present offenses, he participated in making telephone calls of a harassing nature to various persons and was present when his companion made a call of a sexual nature to the murder victim. On the evening the offenses were committed, defendant informed one witness that he was going to pick up a woman, and another that he was going to "get a piece of butt." The evidence that Mrs. Stendal was forcibly raped, prior to her death, was uncontradicted. This evidence, considered with the circumstances that the victim was tied in a manner consistent with defendant's

formal education in the art of trucker's-knots, that the abrasions below defendant's knees and above his right knee were incurred by defendant while his legs were unclothed, and that these abrasions were consistent with injuries observed in other cases of sexual assault, amply support the jury's implied finding that defendant specifically intended to commit rape and that the rape was not a mere incident of the murder.

Defendant also urges there is insufficient evidence to support a finding of felony murder based upon the underlying felony of burglary because there is no evidence demonstrating he entered the residence with the requisite felonious intent (§ 459), in this case the intent to commit rape. Such intent usually must be inferred from all the facts and circumstances revealed by the evidence, because only rarely can it be proved directly. (*People v. Matson* (1974) 13 Cal.3d 35, 41.) In view of (1) the previously described evidence of defendant's conduct in the hours preceding his entry of the Stendal residence, (2) the evidence he spent a period of time immediately outside the residence, presumably contemplating his next act, and (3) the methodical manner in which defendant isolated the victim and committed the rape, the nonsexual physical abuse, and finally the murder itself, it is clear that a rational trier of fact could conclude defendant had the requisite felonious intent prior to his entry into the residence.

C. Special circumstances issues.

1. Torture-murder special circumstance.[5]

Defendant contends the trial court erred in failing to instruct the jury that in order to find the special circumstance charged under section 190.2, subdivision (a)(18) (murder involving torture), to be true, it had to determine that defendant possessed the intent to torture Mrs. Stendal. (*People v. Davenport, supra,* 41 Cal.3d 247, 271.) The jury in defendant's case was instructed that in order to find the torture-murder special circumstance true, it must be proved: "1. That the murder was intentional, and [¶] 2. That the murder involved the infliction of torture. [¶] To prove the infliction of torture, the infliction of extreme physical pain must be proved no matter how long its duration. [¶] Awareness of pain by the deceased is not a necessary element of torture." (CALJIC No. 8.81.18 (4th ed. 1979).)

Although this instruction did not specifically inform the jury that the concept "infliction of torture" included an "intent to torture," nothing in the instruction was inconsistent with that understanding of the concept. Similarly to the juries in *People v. Mincey, supra,* 2 Cal.4th 408, 455, and *People v. Wade* (1988) 44 Cal.3d 975, 994, the present jury was instructed at the guilt phase both as to

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[5] As previously noted, we have discussed defendant's attack on the sufficiency of the evidence of the torture-murder special circumstance, specifically that the evidence was insufficient to establish intent to torture, in resolving defendant's related claim that the evidence was insufficient to sustain his conviction of first degree murder on a theory of torture murder. (See *ante,* pp. ___-___ [typed maj. opn. at pp. 30-31].)

first degree torture murder and as to the torture-murder special circumstance. The first degree torture murder instruction specifically informed the jury that an "intent to cause cruel pain and suffering" (CALJIC No. 8.24 (4th ed. 1979)) was a required element of the offense. As in *Wade*, "nothing in the present record suggests the jury in this case was likely to have drawn any . . . distinction in the use of the term 'torture' in the two instructions." (44 Cal.3d at p. 994.) Also, as in *Wade*, "neither the prosecutor nor defense counsel suggested at any point that a torture-murder special circumstance could be established without first proving an intent to torture." (*Id.*, at pp. 994-995.)

To be sure, as in *People v. Pensinger, supra*, 52 Cal.3d 1210, 1254-1255, and *People v. Wade, supra*, 44 Cal.App.3d 975, 990, the jury was instructed on multiple theories of first degree murder, and therefore the intent to torture may not be established on the mere basis of the guilt verdict on the first degree murder charge. In *People v. Pensinger, supra*, 52 Cal.3d 1210, we reversed the special circumstance finding because, in addition, neither the prosecutor nor defense counsel discussed the issue whether the defendant had intended to torture the victim, either in the context of the murder-by-torture theory of first degree murder or the torture-murder special circumstance. (*Id.*, at p. 1255.)

In the present case, by contrast, the prosecutor in closing argument repeatedly stressed that defendant's intent was to cause cruel pain. For example, the prosecutor asserted: "He wanted to murder her but he wanted her to die slowly and he wanted her to feel her death." Defense counsel also repeated the instruction on intent to

torture. Finally, in rebuttal, the prosecutor reiterated that the prosecution's evidence had demonstrated the intent to torture and also the intent to kill the victim. In further contrast to *People v. Pensinger, supra*, 52 Cal.3d 1210, 1255, there was overwhelming evidence of intent to torture, as described above. In light of the various instructions and the entire trial record, we conclude there is no reasonable likelihood that the jury understood the torture-murder special-circumstance instruction as not requiring a finding of intent to torture. (*People v. Mincey, supra*, 2 Cal.4th 408, 455; see *Estelle v. McGuire* (1991) 502 U.S. ___, ___ [116 L.Ed.2d 385, 399, 112 S.Ct. 475, 482]; *People v. Kelly* (1992) 1 Cal.4th 495, 525.)

Defendant's claim that the evidence is insufficient to support the finding of a torture-murder special circumstance must be rejected. "Proof of a murder committed under the torture-murder special circumstance . . . requires proof of first degree murder (§ 190.2, subd. (a)), proof the defendant intended to kill and to torture the victim (§ 190.2, subd. (a)(18)), and the infliction of an extremely painful act upon a living victim. (*Ibid.*)" (*People v. Davenport supra*, 41 Cal.3d 247, 271.) Unlike the section 189 definition of murder by torture, section 190.2, subdivision (a)(18), requires that the defendant have acted with intent to kill. (41 Cal.3d at p. 271.)

As discussed in detail above, there was ample evidence to support the jury's finding of first degree murder, and to establish that defendant intended to torture his victim, did so while she still was alive, and intended to kill her.

2. Felony-murder special circumstances.

Defendant contends the trial court erred in failing to instruct the jury that in order to find the special circumstances charged under section 190.2, subdivision (a)(17)(iii) (rape) and (vii) (burglary), to be true, it had to determine that defendant possessed the intent to kill Mrs. Stendal. Subsequent to the trial in this case, such an instruction was required by this court's decision in *Carlos v. Superior Court* (1983) 35 Cal.3d 131, 142. Defendant also contends that even had the instructions correctly reflected the intent requirement, there is insufficient evidence to support findings of intent, and that these two special circumstance findings therefore must be set aside.

Defendant's claims are rendered moot by this court's intervening decision in *People v. Anderson, supra,* 43 Cal.3d 1104, 1147, which expressly overruled *Carlos* on this point. In *Anderson,* we held that "intent to kill is not an element of the felony-murder special circumstance; but when the defendant is an aider and abettor rather than the actual killer, intent must be proved." (*Ibid.*) The rule enunciated in *Anderson* applies both to crimes committed after the *Anderson* decision and to crimes committed prior to the *Carlos* decision. (*People v. Hamilton* (1988) 46 Cal.3d 123, 143, fn. 5; *People v. Easter* (1987) 197 Cal.App.3d 183, 185-187; see *People v. Ramirez* (1990) 50 Cal.3d 1158, 1182-1183.) The offenses in this case were committed prior to *Carlos.*

In the present case, the evidence was susceptible of only two reasonable interpretations – that defendant was the actual killer or that he was not at all involved in the

crime; there was no evidence he participated only as an aider and abetter. Accordingly, intent to kill was not an element of the felony-murder special circumstances charged against defendant, and the trial court was not required to instruct on such intent as an element of the alleged special circumstances. (*People v. Hamilton, supra,* 46 Cal.3d 123, 142-143; *People v. Easter, supra,* 197 Cal.App.3d 183, 185.) Although the issue whether there was sufficient evidence to support a finding that defendant possessed the intent to kill therefore is moot in the context of defendant's present contention, we have concluded (as described above) that the evidence is sufficient to establish defendant's intent to kill.

In the present case, because defendant was guilty of murder in the perpetration of the rape, the rape-murder special circumstance properly was found to have been proved if it was established that defendant intended to commit rape, and the rape and the killing were part of one continuous transaction. (See *People v. Hayes, supra,* 52 Cal.3d 577, 631-632; *People v. Hernandez, supra,* 47 Cal.3d 315, 348.) As is amply demonstrated by the evidence, a rational trier of fact could have found that defendant possessed the specific intent to commit rape, and that the rape was not merely incidental to the killing, but part of a continuous course of violence against the victim, culminating in her murder.

The same rule applies with regard to the finding of the burglary-murder special circumstance. (*People v. Hayes, supra,* 52 Cal.3d 577, 632; see *People v. Hernandez, supra,* 47 Cal.3d 315, 348.) A rational trier of fact properly could have found both that defendant intended to commit burglary, and that the burglary of the residence and

the eventual killing were part of one continuous transaction. (See *People v. Hayes, supra,* 52 Cal.3d 577, 632.)

D. Jury deliberations.

1. Substitution of a juror.

The jury retired to deliberate at 3:40 p.m. on December 15, 1982, recessing for the day after less than one hour of deliberations. The following morning, before further deliberations, the court announced that one of the jurors had become ill, and both parties stipulated to his replacement by an alternate juror. After the alternate was sworn, the trial judge advised the jury to resume its deliberations, stating it "would be helpful and in connection with commencing your deliberations again, that you kind of start, start from scratch, so to speak, so that Mr. Rhoades has the benefit of your thinking as well as give him an opportunity for his input also." The jury deliberated two and one-half days after substitution of the alternate juror before returning its verdict.

Defendant contends the court's admonition did not embody all elements of the instruction required by *People v. Collins* (1976) 17 Cal.3d 687. In *Collins,* this court directed that "the court instruct the jury to set aside and disregard all past deliberations and begin deliberating anew. The jury should be further advised that one of its members has been discharged and replaced with an alternate juror as provided by law; that the law grants to the People and to the defendant the right to a verdict reached only after full participation of the 12 jurors who ultimately return a verdict; that this right may only be assured if the jury begins deliberations again from the

beginning; and that each remaining original juror must set aside and disregard the earlier deliberations as if they had not been had." (*Id.,* at p. 694; see also *People v. Anderson* (1990) 52 Cal.3d 453, 482-483.)

Defendant's contention must be rejected. By instructing the jury to "kind of start, start from scratch, so to speak," the court implied that the jury should disregard its previous deliberations. (*People v. Odle* (1988) 45 Cal.3d 386, 405.) By providing this directive in the context of advising the jurors to give the alternate the benefit of the other jurors' thoughts, as well as to give the jurors the benefit of the alternate's input, the court further emphasized that deliberations were to begin anew with the full participation of the alternate. Furthermore, the court did not suggest that the jury might not have to reconsider any matter already considered or decided. (Compare *People v. Odle, supra,* 45 Cal.3d 386, 405 [court's comments erroneously implied that the alternate should be brought "up to speed" on matters already discussed and possibly decided].)

Finally, even assuming the court erred, no prejudice occurred. In determining whether *Collins* error was prejudicial, we may consider whether the case is a close one and compare the time the jury spent deliberating before and after the substitution of the alternate juror. (*People v. Odle, supra,* 45 Cal.3d 386, 405; *Griesel v. Dart Industries, Inc.* (1979) 23 Cal.3d 578, 585.) In *People v. Odle, supra,* 45 Cal.3d 386, we concluded there was no prejudice where the case against the defendant was overwhelming and where the jury deliberated only part of one afternoon prior to substitution of the alternate juror and two and

one-half days thereafter. (*Id.*, at p. 406.) In *People v. Collins, supra*, 17 Cal.3d 687, itself, we determined the error was not prejudicial where the case against the defendant was very strong, and the jury had deliberated little more than one hour prior to substitution of the alternate and had returned a verdict after several additional hours. (*Id.*, at pp. 690, 697.)

In the present case, the evidence against defendant was extremely strong. The jury had deliberated less than one hour prior to substitution of the alternate, and continued to deliberate for two and one-half days thereafter. It is not reasonably probable the outcome of the trial would have been different had the jury been instructed, in more exact language, to begin its deliberations anew. (See *People v. Collins, supra*, 17 Cal.3d 687, 697; *People v. Watson* (1956) 46 Cal.2d 818, 836.)

2. The trial court's comments on the jury's numerical division.

At 4 p.m. on Thursday, December 16, 1982, the first full day of deliberations, the jury conveyed a message to the court that the jury had reached an impasse and was requesting guidance as to how to proceed. The court, stating it had received the jury's message, requested that the jury foreman inform the court as to the numerical division of the jurors, without revealing the respective numbers for a guilty verdict.[6]

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[6] The record of the exchange is as follows:

"THE COURT: All right, we have our jurors back in the box. Mr. Forrester, I received your message as to a numerical count. However, to properly appreciate your message, I'm going to have to ask you a few questions, all right?

"THE FOREMAN: Okay.

"THE COURT: Have the jurors voted on the first count, that would be the issue of murder?

"THE FOREMAN: Uh-huh.

"THE COURT: Without telling me which way that numeral [sic] count is, would you tell me what the numerical count is. Don't tell me which way, but what is the numerical count?

"THE FOREMAN: Eleven to one.

"THE COURT: Eleven to one. All right, now, have the jurors taken a vote on the Count II, the rape charge?

"THE FOREMAN: No, we haven't.

"THE COURT: Have the jurors taken a vote as yet on Count III, the burglary charge?

"THE FOREMAN: No, we haven't.

"THE COURT: All right, now in connection with the – well, I think with that information presented to the Court that it would be of importance that if at the moment – well, let me ask you this. Where do you think you are at the moment as far as the numerical count on the eleven to one on the first charge, the count of murder? Do you think that further consideration –

"THE FOREMAN: Yeah, we just – we're kind of at a standstill."

At this point the court, indicating that it was not unusual in a case of this nature for jurors to deliberate longer than a single day, recessed the jury until the following day.

Defendant contends the court's inquiry into the jury's numerical division impaired the fairness of the trial. "[T]he practice of inquiring into the jury's numerical division, without finding out how many are for conviction and how many for acquittal, was expressly approved in [*People v.*] *Carter* [(1968) 68 Cal.2d 810, 815]." (*People v.*

Rodriguez (1986) 42 Cal.3d 730, 776.) Such inquiry is justified in the discharge of the court's "statutory responsibility of assuring that a verdict is rendered 'unless, at the expiration of such time as the court may deem proper, it satisfactorily appears that there is no reasonable probability that the jury can agree.' (Pen. Code, § 1140.)" (*People v. Carter* (1968) 68 Cal.2d 810, 815.)

Although, as defendant points out, the rule is otherwise in federal court (see *Brasfield v. United States* (1926) 272 U.S. 448 [71 L.Ed. 345, 47 S.Ct. 135]), we previously have explained that this federal rule is not binding on the states. (*People v. Rodriguez, supra,* 42 Cal.3d 730, 776, fn. 14.)[7] In view of the circumstance that the court inquired in a neutral manner as to the numerical count in order to determine whether further deliberations would be productive, we decline to disapprove the practice as it was employed in the present case.

We also disagree with defendant's contention that the court's order declaring a recess until the following morning, once it had ascertained the vote was split, implied the court had found "something wrong" with the vote which might be remedied by a night's rest. The determination, pursuant to section 1140, whether there is a " 'reasonable probability' " of agreement, rests within the

[7] In his supplemental brief, defendant urges that we reconsider the California practice permitting such inquiry, but he also acknowledges we have rejected similar requests in other recent cases. (See, e.g., *People v. Price* (1991) 1 Cal.4th 324, 467; *People v. Breaux* (1991) 1 Cal.4th 281, 319.) We discern no reason, based upon the circumstances of the present case, to reconsider this issue.

sound discretion of the trial court. (*People v. Miller* (1990) 50 Cal.3d 954, 994.) Although the court must take care to exercise its power without coercing the jury into abdicating its independent judgment in favor of considerations of compromise and expediency (*ibid.*), the court may direct further deliberations upon its reasonable conclusion that such direction would be perceived " 'as a means of enabling the jurors to enhance their understanding of the case rather than as mere pressure to reach a verdict on the basis of matters already discussed and considered.' [Citation.]" (*Ibid.*) Nothing in the trial court's comment in the present case properly may be construed as an attempt to pressure the jury to reach a verdict; the court correctly concluded there was a reasonable probability the jurors could agree on a verdict.

3. The trial court's comments on defendant's testimony.

The jury continued its deliberations on Friday, December 17, 1982, at one point requesting that the instructions be reread. At 4:20 p.m. that day, the court was informed that one of the jurors sought to disqualify herself on the ground she was "the one," that is, the person not in agreement with the other eleven. After explaining that this circumstance afforded no basis for disqualification, the trial judge commented on the complexity of the case and the relatively brief period the jury had deliberated, reread the instruction as to defendant's entitlement to the individual opinion of each juror, and, noting the lateness of the hour, recessed the deliberations of the jury.

Prior to the resumption of jury deliberations on Monday morning, December 20, the court delivered the following comments:

"Ladies and gentlemen of the jury and the alternates, for the purpose of assisting you in deciding this case, I am permitted by the Constitution of California to comment on the issues, the evidence and the testimony and credibility of any witness. And it occurred to me that before you retired to continue your deliberations this morning that some comment along those lines might be of some assistance to you.

"Now, you should keep in mind that my comments are intended to be advisory only, and are not binding on you, as you are the exclusive judges of the questions of fact submitted to you and of the credibility of the witnesses. You should disregard any or all of the comments, if you do not agree, if they do not agree with your views of the evidence and the credibility of the witnesses."

After outlining the difference between lawful and unlawful killing, the court stated there was no question in this case but that the killing of the victim was unlawful. The court then indicated the issues before the jury were whether the prosecution had proved beyond a reasonable doubt that defendant was legally responsible for the killing, and if so, in what degree, and if in the first degree, whether the prosecution had proved the special circumstances. The court also stated the jury must determine whether the prosecutor had proved the rape and burglary charges beyond a reasonable doubt.

The court continued: "Now, in that connection, there have been several statements attributed to the defendant

out of court concerning his whereabouts and activities on the night of April the 21st and the early morning hours of April the 22nd. These statements attributed to him are inconsistent with one another and are also inconsistent with his testimony here in court concerning his activities that evening and in the early morning hours of April the 22nd.

"Now, the district attorney has placed him in the house of Bonita Bergh Stendal through three palm prints; one bloody right palm print, which I think Mr. Collins testified to, was created by blood being on the palm first and then transferred to the booklet. In addition to that, Mr. Collins has testified there were two dry palm prints. By that, they were latent, there was a left palm print, which was latent, by that it had a chemical, had to be applied to one of the booklets to raise that palm print to where it could be seen. And another dry palm print of the right palm. Again, one that could only be seen after being treated with chemicals, and that was on a different booklet.

"Now, the defendant has testified and given you an explanation as to what he did in that house that morning which explains the presence of the bloody palm print, but does not explain the presence of the two dry or latent palm prints. Under those circumstances, I have difficulty in believing the testimony of the defendant. Now, again, my comments are intended to be advisory only and are not binding on you as you are the exclusive judges of the questions of fact submitted to you and of the credibility of the witnesses. You should disregard any or all of the comments that I've made if they do not agree with your

views of the evidence and the credibility of the witnesses."

The jury then commenced its deliberations for that day. After recessing for lunch and reconvening at 2:55 p.m., it informed the court it had reached a verdict. Prior to the seating of the jury, defendant's counsel stated he had an objection to the court's comments. The court admonished counsel that he should have made his objection earlier. Defendant contends his right to due process of law was violated because he was not apprised in advance of the court's intention to comment, and that the content of the court's comments fell outside the range permitted by our decisions. We do not agree that defendant's right to due process of law was violated by the court's failure to provide advance notice of its intended comments. Although, as pointed out by defendant, the trial court was required by statute to afford advance notice of intended jury instructions, defendant has not directed our attention to any similar statutory or judicial requirement pertaining to judicial comment. In fact, because the statutory provision authorizing judicial comment is contained in the same section as that governing jury instructions (§ 1127; see § 1093, subd. (f)), and the Legislature while expressly providing that courts are to afford notice of jury instructions (§ 1093.5) has declined to impose such a requirement in the case of judicial comment, we may presume no such requirement was intended by the Legislature as to the latter subject. Defendant relies primarily on *People v. Rodriguez, supra,* 42 Cal.3d 730, in which the trial court provided the parties with advance notice of its intended comments, and indeed, numerous drafts of the comments ultimately

made in that case were prepared by the prosecutor and discussed at length by court and counsel in advance. (*Id.*, at p. 774, fn. 13.) Although it would be better practice to afford counsel advance notice, we decline defendant's suggestion that we elevate our recitation of the particular procedural aspects of the *Rodriguez* case to the status of a legal requirement.

Next, defendant challenges the substance of the trial court's comments. Article VI, section 10, of the California Constitution permits the court to "make such comment on the evidence and the testimony *and credibility of any witness* as in its opinion is necessary for the proper determination of the cause." (Italics added.) The purpose of this provision is to allow the court "to utilize its experience and training in analyzing evidence to assist the jury in reaching a just verdict. [Citations.]" (*People v. Cook* (1983) 33 Cal.3d 400, 407.) In *People v. Rodriguez, supra,* 42 Cal.3d 730, 765-770, we overruled that portion of *People v. Cook, supra,* 33 Cal.3d 400, 413, which held that a trial court may no' make *any* comment on the evidence once the jury has announced it has reached an impasse in deliberations, and concluded that although a trial court may not directly express an opinion on the ultimate issue of guilt or innocence of the accused at any stage of the trial, it is not prohibited from appropriate comment *simply because the jury has indicated an initial deadlock in its deliberations.* (*People v. Rodriguez. supra,* 42 Cal.3d at pp. 769-770; see *People v. Melton* (1988) 44 Cal.3d 713, 735.)

In generally summarizing the permissible contours of constitutionally authorized judicial comment, we observed in *People v. Rodriguez, supra,* 42 Cal.3d 730, that "the decisions admonish that judicial comment on the

evidence must be accurate, temperate, nonargumentative, and scrupulously fair. The trial court may not, in the guise of privileged comment, withdraw material evidence from the jury's consideration, distort the record, expressly or impliedly direct a verdict, or otherwise usurp the jury's ultimate factfinding power. [Citations.]" (*Id.*, at p. 766; *People v. Gates* (1987) 43 Cal.3d 1168, 1207.)

In *People v. Rodriguez, supra*, 42 Cal.3d 730, we also noted that a trial court has "broad latitude in fair commentary, so long as it does not effectively control the verdict. For example, it is settled that the court need not confine itself to neutral, bland, and colorless summaries, but *may focus critically on particular evidence*, expressing views about its persuasiveness. [Citations.]" (*Id.*, at 768, italics added.) Therefore, the circumstance that in the present case, the trial court chose to single out for particular emphasis the evidence concerning the presence of defendant's fingerprints at the crime scene, and defendant's inconsistent testimony, did not render its comments improper. As noted in *Rodriguez*, " '[A] judge may restrict his comments to portions of the evidence or to the *credibility of a single witness* and need not sum up all the testimony, both favorable and unfavorable. [Citations.]' " (*Id.*, at p. 773, italics added.)

In the present case, the trial court essentially observed that defendant had made inconsistent statements concerning his whereabouts during the pertinent period, and that defendant's testimony as to his presence in the residence, while explaining the presence of the bloody palm print, did not explain the presence of the two dry or latent palm prints, causing the trial court to entertain doubts as to defendant's credibility. The trial

court did not inaccurately state or distort any testimony (*People v. Rodriguez, supra*, 42 Cal.3d 730, 766, 769; *People v. Cook, supra*, 33 Cal.3d 400, 408), and its comment that defendant's testimony "explains the presence of the bloody palm print" permitted an inference more helpful to defendant than the jury might have drawn in the absence of the comment. Although the court commented upon defendant's credibility in a specific context, it did not comment on defendant's guilt or innocence, nor did it direct that the jury reach a given verdict.[8] Moreover, both prior to and after its comments, the court admonished the jury that it was free to disregard those comments. We

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[8] The present case is clearly distinguishable from *People v. Flores* (1971) 17 Cal.App.3d 579, 588, in which the appellate court reversed the defendant's conviction for possession of heroin, based upon the trial court's comments on the evidence. In that case, the sole prosecution witness, a police officer, testified he saw the defendant throw away a packet of heroin, and the defendant testified he did not do so. Upon learning that the jury's vote was divided five to seven, the court told the jury that in its opinion it was a very simple, straightforward case, that the court perhaps had heard more evidence than the jury had because the court had "been in this business for some period of time," that it was really a question who was telling the truth, that if the jury believed the officer who testified he saw the defendant throw the packet of heroin away, it must believe the defendant guilty, that defendant's explanation of his behavior in the presence of the officer was not credible, that the defendant had a motive to lie whereas the officer did not, that the defendant had not provided any indication why the officer had a motive to lie, and that the trial court "would not have spent two minutes in deciding this case because I would have decided that the defendant was guilty." (*Id.* at p. 584, fn. 2, italics omitted.)

We believe the comments made by the trial court in the present case do not begin to approach this level of intervention in the jury's decisionmaking.

conclude that the trial court's remarks fell within the scope of the constitutional privilege.

II. PENALTY-PHASE ISSUES

A. Alleged prosecutorial misconduct.

Defendant asserts the prosecutor committed misconduct in closing argument, when he stated the following: "[C]ircumstantial evidence is the best evidence in the world, if the circumstantial evidence is good enough. [¶] And in this case, of course, we've got the best circumstantial evidence you're ever going to get." Defendant objects to the designation of this evidence as the "best evidence in the world," but acknowledges the jury later was correctly instructed according to CALJIC No. 2.00 (1979 rev.) that: "Both direct evidence and circumstantial evidence are acceptable as a means of proof. Neither is entitled to any greater weight than the other." Any misapprehension on the part of the jury would have been corrected by this instruction. Furthermore, because defendant did not timely object or request an admonition, any error is deemed waived on appeal. (*People v. Mitcham* (1992) 1 Cal.4th 1027, 1077; *People v. Hendricks* (1988) 44 Cal.3d 635, 650.) Defendant's claim that the prosecutor's statement constituted an improper expression of his personal belief concerning this evidence must be rejected on the same ground.

Defendant next asserts the prosecutor's argument violated the rule in *People v. Davenport, supra,* 41 Cal.3d 247, 288-290, by representing that the absence of the following circumstances in mitigation constituted factors

in aggravation under section 190.3: any mental or emotional disturbance on the part of defendant (factor (d)), the victim's participation in or consent to the homicidal act (factor (e)), and any circumstances causing defendant reasonably to believe in moral justification for his conduct (factor (f)). Although in *Davenport* we admonished that such argument should not be permitted "in the future" (*Id.*, at p. 290), we nevertheless have applied the rule to cases tried, as was the present case, prior to *Davenport*. *People v. Beardslee* (1991) 53 Cal.3d 68, 112.)

We observe, as we have in the past, that defendant's failure to object to the challenged remarks precludes a claim of prosecutorial misconduct. (*People v. Visciotti* (1992) 2 Cal.4th 1, 79; *People v. Gallego* (1990) 52 Cal.3d 115, 200; *People v. Rodriguez, supra,* 42 Cal.3d 730, 790.) Even assuming, as defendant has urged in his supplemental brief, that *Davenport* error served to exacerbate so-called *"Brown"* error (*People v. Brown* (1985) 40 Cal.3d 512 (revd. on other grounds in *California v. Brown* (1987) 479 U.S. 538 [93 L.Ed.2d 934, 107 S.Ct. 837]); see discussion, *post*), entitling defendant to review of his claim of error despite his failure to object (*People v. Edelbacher* (1989) 47 Cal.3d 983, 1035, fn. 16), there is no reasonable possibility the prosecutor's argument could have prejudiced the jury's sentencing decision. First, in view of the instructions on aggravating and mitigating factors described more fully below, there is no reasonable likelihood the jury would have been misled by the prosecutor's comments concerning the nature of the weighing process. (*People v. Clair* (1992) 2 Cal.4th 629, 662-663.) Second, the jury was instructed to consider the enumerated factors only "if applicable," allowing the jury to assign whatever

weight was appropriate to each particular factor. (*People v. Gallego, supra*, 52 Cal.3d 115, 200; *People v. Brown* (1988) 46 Cal.3d 432, 454-456.) In light of the nature of the aggravating evidence that properly was introduced, we conclude it is not reasonably possible that any mischaracterization by the prosecutor could have influenced the sentencing decision of a reasonable jury. (*Id.*, at p. 456.)

Defendant also complains the prosecutor impermissibly offered as a factor in aggravation the nonstatutory ground that defendant showed "absolutely no remorse."[9] Where a prosecutor does not suggest that a defendant's lack of remorse should be considered a factor in aggravation, he or she properly may comment on the lack of remorse. (*People v. Gallego, supra*, 52 Cal.3d 115, 197; *People v. Carrera* (1989) 49 Cal.3d 291, 339; see *People v. Sully* (1991) 53 Cal.3d 1195, 1249.)

The record discloses that defendant's objection to the prosecutor's remark was sustained. The trial court denied defense counsel's request for an additional curative instruction on the basis that the prosecutor had not

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[9] The prosecutor's comment in context is as follows: "And let me suggest that in this case, there is no basis for sympathy for William Proctor. This is what he does on April 21st, 1982. That's what he does on April 21st. On April 22nd, what's he do? He shows absolutely no remorse." After the court sustained the defense objection, the prosecutor continued: "What does he do on the 22nd? He goes about his business like nothing happened. He goes to Redding. He goes with Bob Manley. And they go there for the purpose of having fun. [¶] The defendant spent April 22nd, 1982, having fun, less than twenty-four hours after he did that, and I submit there is no basis for sympathy for William Proctor in this case."

claimed defendant's lack of remorse was a factor in aggravation, the court explaining it had sustained the objection because the statement constituted a conclusion.

We conclude the trial court was correct in ruling that the prosecutor had not cited lack of remorse as a factor in aggravation, although the court did err in sustaining the defense's objection that the prosecutor's statement expressed an impermissible conclusion. Thus, the trial court did not commit error in refusing defendant's request for an additional instruction or admonition.

Finally, defendant urges that the prosecutor committed prejudicial misconduct by erroneously claiming that the evidence of defendant's past demonstrated that he "is a violent person."[10] Defendant's failure to object and request a curative instruction or admonition waives any claim he might have on appeal. (*People v. Sully, supra*, 53 Cal.3d 1195, 1248; *People v. Rodriguez, supra*, 42 Cal.3d 730, 790.)

Nonetheless, assuming defendant timely had objected, we reject defendant's claim on the merits. We conclude that the prosecutor's remark was justifiable based

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[10] After canvassing the factors supporting imposition of the death penalty, the prosecutor commented: "Now, I submit that there is nothing that has been presented to you that would extenuate this crime. There is nothing about the defendant's background that you heard that would extenuate this crime. [¶] According to his aunt, he was a normal, average boy growing up, and his mother said that, essentially, as I recall. The only thing you know about his background is that he's had a little history of burglary, takes things that don't belong to him, and he is a violent person. That's what you know about his background. To me, that is not extenuating circumstances."

on the extreme violence displayed by defendant in committing the present offenses. The prosecutor earlier had informed the jury that the circumstance of defendant's lack of any history of violence was a factor in mitigation. Although the prosecutor made the comment regarding defendant's being a violent person while discussing his background, it is apparent from the context of the entirety of the prosecutor's remarks that he was referring to defendant's conduct in the present case in characterizing defendant as a "violent person."

B. Instructional Error.

1. Instruction on aggravating and mitigating factors.

Defendant contends the court's instruction of the jury pursuant to former CALJIC No. 8.84.2 (4th ed. 1979 rev.)[11]

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[11] The court gave the 1979 revised version of former CALJIC No. 8.84.2, as follows: "[I]t is now your duty to determine which of the two penalties, death or confinement in the state prison for life without possibility of parole, shall be imposed upon the defendant. [¶] After having heard all of the evidence, and after having heard and considered the arguments of counsel, you shall consider, take into account, and be guided by the applicable factors of aggravating and mitigating circumstances upon which you have been instructed. [¶] If you conclude that the aggravating circumstances outweigh the mitigating circumstances, you shall impose a sentence of death. However, if you determine that the mitigating circumstances outweigh the aggravating circumstances, you shall impose a sentence of confinement in the state prison for life without possibility of parole. [¶] Before you may consider a particular aggravating circumstance to be true, you must be satisfied of the existence of that aggravating circumstance beyond a reasonable doubt."

violated his Eighth Amendment right under the federal Constitution to a constitutionally reliable determination of penalty, because the instruction may have confused the jury concerning the nature of the process of weighing aggravating and mitigating circumstances.

In *People v. Brown, supra* 40 Cal.3d 512, we upheld the constitutionality of section 190.3, while acknowledging that an instruction incorporating the mandatory language of the section "might mislead jurors as to the scope of their sentencing discretion and responsibility." (*People v. Bonin supra*, 46 Cal.3d 659, 706; *People v. Hamilton* (1988) 45 Cal.3d 351, 370.) We expressed concern that a jury reasonably might understand the language of the instruction to define the determination of penalty as " 'simply a finding of facts' " or " 'a mere mechanical counting of factors on each side of the imaginary "scale." ' " (*Ibid.*) We also expressed concern that the jury reasonably might understand the instruction to require imposition of the death penalty if the factors in aggravation outweigh those in mitigation, even where that punishment does not appear appropriate in view of all the circumstances of the case. (*People v. Hamilton, supra*, 45 Cal.3d at pp. 370-371; *People v. Brown, supra*, 40 Cal.3d at pp. 540-544.) For those cases predating *Brown* (such as the present case) in which the jury was instructed in the language of section 190.3, we advised we would review each appeal on its particular merits to determine whether the jury might have been misled to the defendant's prejudice. (*People v. Hamilton, supra*, 45 Cal.3d 351, 371; *People v. Brown, supra*, 40 Cal.3d at p. 544, fn. 17.)

In the present case, with regard to the first concern expressed in *Brown, supra*, 40 Cal.3d 512, we observe that

the jury was instructed, according to defendant's request, as follows: "In considering, taking into account, and being guided by the aggravating and mitigating circumstances, you may not decide the effect of such circumstances by the simple process of counting the number of circumstances on each side. The particular weight of such opposing circumstances is not determined by the relative number, but rather by their relative convincing force on the ultimate question of punishment." Moreover, neither the prosecutor nor defense counsel suggested the jury simply should count the factors. (See *People v. Webster* (1991) 54 Cal.3d 411, 451-452; *People v. Howard* (1988) 44 Cal.3d 375, 435-436; *People v. Myers* (1987) 43 Cal.3d 250, 275.) Accordingly, we conclude the jury was not misled into mechanically counting the aggravating and mitigating factors.

With regard to the second concern described in *Brown, supra,* 40 Cal.3d 512, defendant asserts the jury was misled because, during voir dire, the prosecutor obtained assurances from the prospective jurors that they would not have difficulty in discharging their responsibility to impose the death penalty in the event the aggravating circumstances outweighed those in mitigation, and because, during closing argument, the prosecutor emphasized the language of section 190.3. After repeating the mandatory language of the statute, the prosecutor stated: "So if you conclude that the aggravating circumstances outweigh the mitigating circumstances, you are obligated to return a verdict of death. [¶] And we spent a considerable amount of time on voir dire on this issue, and you indicated that if that was the case, that would be your verdict." In concluding his argument,

the prosecutor commented that the jury had "an important, awesome responsibility," and asked them to return a death verdict "not because you want to but because under the law of California it's necessary. Thank you."

In numerous cases we have found such remarks to be harmless. For example, we have concluded that a prosecutor's argument is not misleading simply because it restates the statutory language (e.g., *People v. Hamilton* (1989) 48 Cal.3d 1142, 1181), describes the statutory language as mandatory (e.g., *People v. Adcox* (1988) 47 Cal.3d 207, 267 [prosecutor emphasized the word "shall" and advised the jury that "you haven't any choice"]; *People v. Hendricks, supra,* 44 Cal.3d 635, 653-655, 662 [Prosecutor emphasized the word "shall," describing it as a "term of command" with a compulsory meaning, and the process as an "automatic" one]; *People v. Allen* (1986) 42 Cal.3d 1222, 1279 [Prosecutor argued: " ' . . . *Shall, not may, not might, not maybe. It is very explicit*. . . . ' "]), or emphasizes that the jury's decision is dictated by the law. (E.g., *People v. Burton* (1989) 48 Cal.3d 843, 870; *People v. Grant* (1988) 45 Cal.3d 829, 857.)

Moreover, in concluding, the prosecutor emphasized that the jurors had an "important, awesome responsibility." (See *People v. Burton, supra,* 48 Cal.3d 843, 871.) This is not a case, such as *People v. Milner* (1988) 45 Cal.3d 227, in which the prosecutor "assured the jurors again and again that they did not have to 'shoulder the burden of personal responsibility,' told them again and again that the law 'protects' them from deciding what is 'just and right,' and even encouraged them to 'hide' behind the law." (*Id.*, at p. 257; see *People v. Burton, supra,* 48 Cal.3d 843, 872.) Nor did the prosecutor admonish the jury that

the law, rather than the jury, determined the issue whether the defendant should suffer life imprisonment or death. (Cf. *People v. Farmer* (1989) 47 Cal.3d 888, 928.) Furthermore, taken as a whole, the prosecutor's statements concerning the mandatory aspect of section 190.3 were a minor part of his closing argument. (See *People v. Kaurish* (1990) 52 Cal.3d 648, 715.)

The instructions given in this case also implied that the jury's decision as to penalty was not to be automatic or mechanical. The jury twice was informed it had the duty to decide which of the two possible punishments should be imposed, was advised to consider the evidence, the arguments of counsel, and the aggravating and mitigating factors "if applicable," and was told that if a factor was not found to be mitigating, that circumstance did not render it an aggravating factor unless the jury determined it to be aggravating beyond a reasonable doubt. At defendant's request, the jury was instructed that it was obligated to weigh the sympathetic elements of defendant's background against those which might offend the conscience, and in so doing, it could consider pity, sympathy, and mercy for defendant, but that it could not be governed by conjecture, prejudice, or public opinion. The jury also was instructed that defendant and the prosecution were entitled to the individual opinion of each juror.

Finally, the comments of defense counsel underscored the jury's discretion to decide which penalty was appropriate under the circumstances: counsel advised the jurors that each of them had an independent, singular responsibility to determine the punishment, that it was not a democratic or community effort, and that each

would have to live with the verdict. Defense counsel told the jurors to consider and weigh the factors, as they felt appropriate. (See *People v. Grant, supra,* 45 Cal.3d 829, 856-857; *People v. Williams* (1988) 44 Cal.3d 1127, 1149.) Moreover, defense counsel stressed that the most important factor, a factor in mitigation, was the absence of any violence in defendant's past, thereby underscoring the jurors' duty to consider the factors individually.

From the arguments both of the prosecutor and defense counsel, and from the instructions, the jurors would have understood that they were required to determine the appropriate penalty for defendant by weighing the enumerated factors. (*People v. Burton, supra,* 48 Cal.3d 843, 873.) Viewing the instructions and arguments as a whole, we are satisfied there is no reasonable likelihood that the jury was misled as to the scope of its sentencing responsibility. (*People v. Clair, supra,* 2 Cal.4th 629, 662-663.)[12]

2. Instruction on consideration of multiple special circumstances.

Defendant contends the trial court failed to give an instruction on multiple special circumstances as required

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[12] In light of this conclusion, we need not, and do not, address the continuing validity of *People v. Brown, supra,* 40 Cal.3d 512, in light of the United States Supreme Court's decisions in *Blystone v. Pennsylvania* (1990) 494 U.S. 299, 108 L.Ed.2d 255, 110 S.Ct. 1078, and *Boyde v. California* (1990) 494 U.S. 370, 108 L.Ed.2d 316, 110 S.Ct. 1190. (*People v. Webster, supra,* 54 Cal.3d 411, 452, fn. 23; *People v. Cooper, supra,* 53 Cal.3d 771; 845, fn. 15; *People v. Gonzalez* (1990) 51 Cal.3d 1179, 1231, fn. 30.)

by our decision in *People v. Harris* (1984) 36 Cal.3d 36. In *Harris*, the plurality opinion stated that in a case where "overlapping" special circumstances are found to be true, the risk arises that a jury may give undue weight to the mere number of special circumstances found true. "To avoid that risk, in those cases involving a single act or an indivisible course of conduct with one principal criminal objective, the jury should be instructed that although it found several special circumstances to be true, for purposes of determining the penalty to be imposed, the multiple special circumstances should be considered as one." (*Id.*, at p. 66, plur. opn. by Broussard, J.)

A majority of this court subsequently held to the contrary in *People v. Melton, supra*, 44 Cal.3d 713, 765-768. In *Melton* we concluded that it is constitutionally legitimate for the state to determine that a death-eligible murderer is more culpable and thus more deserving of death, if, as in the *Melton* case, he not only robbed the victim but committed burglary in order to facilitate commission of the robbery and murder, because these offenses involve violations of distinct interests, each of which is relevant to a determination of the seriousness of the crime. (*Id.*, at p. 767.) The decision in *Melton* has been applied in subsequent cases to reject similar claims based upon *Harris*. (E.g., *People v. Mickey* (1991) 54 Cal.3d 612, 691-692; *People v. Sanders* (1990) 51 Cal.3d 471, 529; *People v. Hernandez, supra*, 47 Cal.3d 315, 357-358.) Accordingly, we reject defendant's contention.

In his supplemental brief, defendant contends that *Melton* also requires that the jury receive instruction that the acts providing the bases for the special circumstances (rape and burglary) may not each be weighed more than

once in the penalty determination, that is, both under the circumstances of the crime and as special circumstances (pursuant to section 190.3, factor (a), and the instruction patterned thereon). (*People v. Melton, supra*, 44 Cal.3d 713, 768.) Although defendant urges that the trial court has a sua sponte duty to so instruct, we have indicated only that upon defendant's request, such an instruction should be given. (*People v. Ashmus* (1991) 54 Cal.3d 932, 997; *People v. Morris* (1991) 53 Cal.3d 152, 224; *People v. Melton, supra*, 44 Cal.3d 713, 768.)

Moreover, we have observed that in the absence of any misleading argument by the prosecutor or an event demonstrating the substantial likelihood of "double-counting," reversal is not required. (*People v. Morris, supra*, 53 Cal.3d 152, 224; *People v. Melton, supra*, 44 Cal.3d 713, 768-769.) In the present case, the prosecutor did not suggest the offenses other than murder be considered dually as special circumstances and as acts making the murder more heinous; he simply underscored the facts showing the brutality of the acts.

C. Constitutionality of section 190.3 factor (a).

Defendant challenges the constitutionality of the portion of section 190.3 that provides: "In determining the penalty, the trier of fact shall take into account . . . [as] relevant: [¶] (a) The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstance found to be

true. . . . " Defendant contends the phrase, "the circumstances of the crime," is too vague to permit any meaningful distinction between those murders that warrant the death penalty and those that do not.

The United States Supreme Court itself has established that the circumstances surrounding a capital offense constitute one of the criteria upon which the jury *should* base its penalty determination. (See, e.g., *Penry v. Lynaugh* (1989) 492 U.S. 302, 318, 106 L.Ed.2d 256, 109 S.Ct. 2934; *Booth v. Maryland* (1987) 482 U.S. 496, 502, 96 L.Ed.2d 440, 107 S.Ct. 2529, overruled on other grounds in *Payne v. Tennessee* (1991) ___ U.S. ___, 115 L.Ed.2d 720, 111 S.Ct. 2597; *Jurek v. Texas* (1976) 428 U.S. 262, 304, 49 L.Ed.2d 944, 96 S.Ct. 2950 (plur. opn.). The high court has not stated or implied that the factor of the "circumstances of the offense" is unconstitutionally vague.

Defendant also contends section 190.3 is unconstitutional as applied to him because, unlike the typical case where the same jury decides both issues of guilt and penalty, his case afforded the jurors only one opportunity to express their outrage at the offenses – by assigning the degree of punishment – and therefore the jury was more prone to set the maximum penalty. Nothing in the evidence, the arguments of counsel, or the instructions supports this assertion. Furthermore, because it was defendant who requested the change of venue and, by definition, the new jury, he is not in a position to claim prejudice from the granting of his motion. We also note that defendant has provided no authority for the proposition that, when a new penalty jury has been impaneled, the state may not permit the jury to determine the appropriate punishment on the basis of the same criteria that

would have applied had a single jury determined both issues of guilt and penalty. Defendant has not provided any basis for us to conclude section 190.3 is unconstitutional.

D. Denial of the automatic application for modification of the verdict.

Defendant contends the court erred in denying the automatic motion to modify the verdict pursuant to section 190.4, subdivision (e). Under that section, the trial judge's "function is not to make an independent and de novo penalty determination, but rather to independently reweigh the evidence of aggravating and mitigating circumstances and then to determine whether, in the judge's independent judgment, *the weight of the evidence supports the jury's verdict.* [Citations.]" (*People v. Lang* (1989) 49 Cal.3d 991, 1045, italics in original; *People v. Edwards, supra,* 54 Cal.3d 787, 846.) The trial judge must set forth his or her reasons with sufficient particularity to allow effective appellate review. (54 Cal.3d at p. 846; *People v. Kelly* (1990) 51 Cal.3d 931, 970.)

1. The circumstances of the crime.

Relying upon *People v. Rodriguez, supra,* 42 Cal.3d 730, defendant contends the trial court did not adequately specify its reasons for determining that section 190.3, factor (a) (the circumstances of the crime), amounted to an aggravating factor. In that case, we held the court's statement of reasons for denying the motion, as a whole, was insufficient "to assure thoughtful and effective

appellate review," where the trial court simply stated that, having considered the arguments of counsel, all the evidence, and all the aggravating and mitigating circumstances, the aggravating factors outweighed those in mitigation and the weight of the evidence supported the jury's verdict of death. (At pp. 792-794.)

In the present case, the trial court's comments, in considering the section 190.3 factors generally and factor (a) in particular, were far more extensive and detailed. In explaining its ruling denying the automatic motion, the court commented that it had reviewed the evidence, considered the aggravating and mitigating factors, and made a determination whether the jury's verdict (that the aggravating circumstances outweighed the mitigating circumstances) was contrary to law or to the evidence. Following defense counsel's argument that the offenses committed in the present case were not sufficiently grievous to justify the death penalty, the court stated it had examined and carefully reviewed the testimony presented and had found that the jury's verdict was supported by the weight of the evidence and that defendant was guilty beyond a reasonable doubt.

The court then considered each section 190.3 factor in turn, devoting the greatest amount of time to factor (a), the circumstances of the crime. The court summarized the evidence, emphasizing that the telephone lines in the kitchen and the den had been cut, and that the victim had been raped, beaten, stabbed, and intentionally tortured by defendant. The court described in detail the condition of the body and recounted the expert testimony concerning the nature of the victim's injuries and defendant's purpose in inflicting them. The court also noted that

defendant had transported the victim's body to another location.

The trial court's discourse on section 190.3, factor (a), was sufficiently detailed and thorough to justify the determination made by the court. It is readily apparent the court provided far more elaboration than did the trial court in *Rodriguez, supra,* 42 Cal.3d 730, and defendant does not indicate what additional elements he believes the court should have considered in deciding whether the circumstances of the capital offense constituted a factor in aggravation. We conclude the court adequately stated its reasons for determining that the circumstances of the crime constituted an aggravating factor.

2. Defendant's role in the crime.

Section 190.3, factor (j), specifies that among the matters to be considered by the trier of fact in determining the penalty is "[w]hether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor." Defendant contends that, because the evidence merely established the inapplicability of factor (j), it was improper for the trial court to consider, as a factor in aggravation, the circumstance that defendant acted alone.

We have indicated or implied in numerous prior decisions that factor (j) may be considered only as a mitigating factor, and that where the defendant is not an accomplice whose participation in the offense is relatively minor, the factor is simply inapplicable and should not be considered as aggravating. (*People v. Daniels, supra,* 52

Cal.3d 815, 889; *People v. Gallego, supra,* 52 Cal.3d 115, 200; *People v. Gonzalez, supra,* 51 Cal.3d 1179, 1233-1234; *People v. Hamilton, supra,* 48 Cal.3d 1142, 1184; *People v. Burton, supra,* 48 Cal.3d 843, 865; *People v. Walker* (1988) 47 Cal.3d 605, 643-644; *People v. Hernandez, supra,* 47 Cal.3d 315, 363-364; *People v. Adcox, supra,* 47 Cal.3d 207, 273; *People v. Moore* (1988) 47 Cal.3d 63, 92 & fn. 13; *People v. Karis* (1988) 46 Cal.3d 612, 652; *People v. Brown, supra,* 46 Cal.3d 432, 455-456 & fn. 10; *People v. Siripongs* (1988) 45 Cal.3d 548, 582-583; see *People v. Davenport, supra,* 41 Cal.3d 247, 288-290.) Nonetheless, in *People v. Howard, supra,* 1 Cal.4th 1132, 1195, we approved the trial court's treatment of evidence of that defendant's sole participation as aggravating under factor (j). We need not decide the issue raised by the apparent conflict among these decisions, because any error in the present case would not have been prejudicial.

The People indicate that the failing, if any, in the trial court's consideration (under section 190.3, factor (j)) of the evidence that defendant had acted alone, consists in the court's already having considered defendant's singular and active role in the offense when the court reviewed the circumstances of the offense under section 190.3, factor (a). In his reply brief, defendant contends that the trial court did, in fact, err in this regard.

Our review of the record reveals, however, that at no time during the court's discourse on the circumstances of the offense did it emphasize, or even mention, that defendant had acted alone. That the court reviewed defendant's *commission* of the offense (and the nature of that offense) does not lead to the conclusion that the court considered defendant's exclusive participation in the acts

as a circumstance in aggravation under section 190.3, factor (a). Aside from the court's consideration, under section 190.3, factor (j), of defendant's role in the offense, the only other reference by the court to the circumstance that defendant acted alone was made in the context of its review of section 190.3, factor (g), addressing whether defendant had acted under extreme duress or under the domination of another person. In the latter part of its review, the court simply noted that, because defendant had acted alone, factor (g) was inapplicable. The court did not consider twice the evidence that defendant had acted alone in conceiving and carrying out the offense, and therefore, any error in considering this circumstance under factor (j) was harmless. (*People v. Burton, supra,* 48 Cal.3d 843, 865; *People v. Adcox, supra,* 47 Cal.3d 207, 273.)

3. Defendant's age and prior felony convictions.

Defendant next asserts the trial court erred in determining that, although defendant's age (twenty years, three and one-half months at the time of the offense) "could be a mitigating factor," the circumstances that defendant had been convicted of three prior felonies, had violated probation in March 1981, and was on parole at the time he committed the present offense, rendered defendant's age neither a mitigating nor an aggravating factor.

Depending upon the circumstances of the crime, age properly can be considered either as a mitigating or an aggravating factor. (*People v. Mitcham, supra,* 1 Cal.4th 1027, 1076; *People v. Edwards, supra,* 54 Cal.3d 787, 844.) It

functions " 'as a metonym for any age-related matter suggested by the evidence or by common experience or morality that might reasonably inform the choice of penalty.' " (*People v. Mitcham, supra,* 1 Cal.4th 1027, 1076.)

Therefore, in the present case the trial court was not obligated to treat defendant's age as a factor in mitigation. Moreover, we believe that although the court expressed itself somewhat imprecisely, in essence it weighed the two factors of defendant's age and his prior felony convictions in concluding, in light of defendant's prior record, that the circumstance that he was between 20 and 21 years of age at the time he committed the present offense was not entitled to much weight. The court properly weighed these factors in assessing whether the penalty was appropriate. (See, e.g., *People v. Hamilton, supra,* 48 Cal.3d at pp. 1186-1187.)[13]

4. Consideration of other extenuating circumstances.

Defendant contends that the court inadequately stated its reasons for concluding no mitigating circumstances were present under section 190.3, factor (k),[14] and

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[13] Because the trial court did not consider any "invalid aggravating factor" (including any aggravating factor not supported by substantial evidence) in denying the motion under section 190.4, subdivision (e), *Sochor v. Florida* (1992) ___ U.S. ___, ___ [119 L.Ed.2d 326, 112 S.Ct. 2114, 2120-2123], cited in defendant's supplemental brief, has no application to the present case.

[14] The court stated: "[T]he final factor is, quote, any other circumstances which extenuate the gravity of the crime, even

that the court's statement did not indicate it had assessed the credibility of the witnesses, determined the probative force of the testimony, and weighed the evidence.

As described above, the court reiterated that it had evaluated all the evidence and expressly considered the evidence or absence of evidence relating to each successive factor, examining carefully the evidence in mitigation. After expressing its views as to the applicability of section 190.3, factor (k), the court stated: "As required by law, the Court has considered all the evidence adduced at the penalty phase of the trial and has been guided by the aforesaid factors, and having heard and considered the arguments of counsel, the Court concludes and finds that the aggravating circumstances do in fact outweigh the mitigating circumstances and therefore the jury's finding is supported by the evidence." The court stated that, in its independent review of all the evidence, it found the jury's verdict was not contrary to the law or the evidence.

The trial court's comments make clear that it fully understood its obligation to assess the credibility of the witnesses, determine the probative force of the testimony, and weigh the evidence, including all information pertaining to defendant and applicable under section 190.3, factor (k). We conclude the statement of reasons given by

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though it is not a legal excuse for the crime, including but not limited to the defendant's character, background, history, mental condition and physical condition, end quote. [¶] The evidence adduced at the penalty phase of the trial causes the court to find that there are no circumstances which extenuate the gravity of the crimes which you committed and for which you have been convicted. Therefore, the Court finds that this factor constitutes neither a mitigating nor an aggravating factor."

the trial court for its determination pursuant to factor (k) was adequate.

We also reject the contention, raised in defendant's reply brief, that the court, in referring to its finding that the jury's verdict was not contrary to the law or the evidence, demonstrated that it misconstrued its task in reviewing the evidence independently under section 190.4. The statements made by the court reveal that it accurately perceived its duty to reweigh independently the evidence of aggravating and mitigating circumstances and then determine whether, in its independent judgment, the weight of the evidence supported the jury's verdict. (§ 190.4, subd. (e); *People v. Edwards, supra,* 54 Cal.3d 787, 846; *People v. Lang, supra,* 49 Cal.3d 991, 1045.) In view of the numerous instances in which the trial court reiterated that it independently had reviewed the evidence, and the particularity with which the court reviewed the evidence, we conclude the court properly understood and performed the obligation imposed upon it by section 190.4, subdivision (e).

III. CONCLUSION

The judgment is affirmed in its entirety.

GEORGE, J.

WE CONCUR:

LUCAS, C.J.
PANELLI, J.
ARABIAN, J.
BAXTER, J.

CONCURRING AND DISSENTING OPINION BY KENNARD. J.

I concur in the judgment. I write separately to emphasize that the authority of trial courts to comment on the evidence is subject to strict limitations and must be exercised with extreme caution, and to express my view that, consistent with this court's well-established case law, factor (j) of Penal Code section 190.3 cannot be an aggravating circumstance.

I.

Our Constitution (Cal. Const., art. VI, § 10), as well as our statutes (Pen. Code, §§ 1093, subd. (f), 1127), grant trial courts the authority to comment on the testimony and credibility of witnesses. But there is a countervailing consideration. The Constitutions of both the United States (U.S. Const., Amend. VI) and the State of California (Cal. Const., art. I, § 16) also grant a criminal defendant the right to a jury trial, and that right requires that the jury be the exclusive arbiter of questions of fact and the credibility of witnesses. (See e.g., *People v. Rodriguez* (1986) 42 Cal.3d 730, 766; *People v. Friend* (1958) 50 Cal.2d 570, 577-578; *People v. Ottey* (1936) 5 Cal.2d 714, 728.)

There is an inherent tension between the authority of a trial court to comment on the evidence and the right of a criminal defendant to a jury trial. A court's exercise of its authority to comment on the evidence always poses the danger of a violation of the right to jury trial. Because a judge presiding over a trial necessarily has substantial influence on the jury (*Bollenbach v. United States* (1946) 326 U.S. 607, 612), every judicial comment on the evidence

carries with it an appreciable risk that the jury may discount its own view of the evidence in deference to the judge's opinion. (*People v. Cook* (1983) 33 Cal.3d 400, 407.) Therefore, in the interest of protecting the right to jury trial while giving efficacy to our state Constitution's grant of authority to comment on the evidence, appellate courts have imposed strict limitations on the trial court's authority to comment.

Thus, a trial court's comments on the evidence must be "necessary for a proper determination of the cause." (Cal. Const., art. VI, § 10.) They must assist, not coerce, the jury. (*People v. Rodriguez, supra,* 42 Cal.3d at pp. 767-768.) The court must inform the jurors that they are the exclusive judges of all questions of fact and of the credibility of witnesses. (Pen. Code, § 1127; *People v. Brock* (1967) 66 Cal.2d 645, 651.) The comments must be made with a view to protecting the rights of the defendant. (*People v. Brock, supra,* 66 Cal.2d at p. 650.) They must be accurate, temperate, scrupulously fair, and made with wisdom and restraint. (*People v. Cook, supra,* 33 Cal.3d at p. 408.) The comments may not (1) be argumentative (*Ibid.*); (2) distort the law or the record (*People v. Brock, supra,* 66 Cal.2d at p. 650; *People v. Friend, supra,* 50 Cal.2d at p. 577); (3) withdraw evidence from the jury's consideration (*People v. Brock, supra,* at p. 650); (4) expressly or impliedly direct a verdict (*People v. Cook, supra,* 33 Cal.3d at p. 408; *People v. Brock, supra,* 66 Cal.2d at p. 650); or (5) express a view on the ultimate issue of guilt or innocence (*People v. Melton* (1988) 44 Cal.3d 713, 735).

In this case, the trial court's comments came perilously close, but did not cross, the line between permissible jury assistance and prohibited coercion. The court

made its remarks without notice to counsel and after it was aware that the jury had deadlocked 11 to 1. The comments, however, were accurate and did not distort the record. Immediately before and after the comments, the court reminded the jury that it was the exclusive arbiter of questions of fact and the credibility of the witnesses, and that it was free to disregard any or all of the trial court's comments. The jury then continued its deliberations for approximately four hours. (Compare *People v. Cook, supra,* 33 Cal.3d at p. 406 [jury returned verdict fourteen minutes after trial court's comments].)

On balance, giving consideration to all of the circumstances in which the trial court's comments were made (*People v. Melton, supra,* 44 Cal.3d at p. 735) in the context of the existing state of the law (see *People v. Rodriguez supra,* 42 Cal.3d at pp. 765-770), I agree with the majority's conclusion that the trial court's comments were within the scope of its authority under article VI, section 10 of the state Constitution. I emphasize, however, that a trial court's option to comment on the evidence should be exercised, if at all, only with great caution.

II.

As a result of numerous decisions of this court in recent years, it is now well-established that the circumstance described in factor (j) of Penal Code section 190.3 (hereafter factor (j)) can only be mitigating. Yet the majority now treats this issue as unresolved (see maj. opn., *ante,* pp. ___-___ [typed maj. opn. at pp. 73-74]), even

though it was resolved years ago. In so doing, the majority injects a harmful and entirely needless uncertainty into the center of our death penalty law.

Factor (j) directs the jury in the penalty phase of a capital case to consider "[w]hether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor" in deciding whether to impose the death penalty. Thus, if the defendant is an accomplice whose role in the offense was relatively minor, the jurors must consider this fact as a circumstance in mitigation, although they are free to give it whatever weight they deem appropriate. If these conditions are not satisfied, factor (j) is inapplicable, as the defendant's conduct in this regard is not "*more* serious than 'normal' " for a person who has been convicted of murder with special circumstances. (*People v. Daniels* (1991) 52 Cal.3d 815, 889; *People v. Burton* (1989) 48 Cal.3d 843, 864-865; *People v. Adcox* (1988) 47 Cal.3d 207, 273; *People v. Siripongs* (1988) 45 Cal.3d 548, 583; see also *People v. Davenport* (1985) 41 Cal.3d 247, 289-290.)

When, as here, the defendant is the sole perpetrator of the murder, factor (j) does not apply, as this court has held on numerous occasions. *People v. Daniels, supra,* 52 Cal.3d at p. 889; *People v. Hamilton* (1989) 48 Cal.3d 1142, 1184; *People v. Hernandez* (1988) 47 Cal.3d 315, 364; *People v. Karis* (1988) 46 Cal.3d 612, 652; *People v. Brown* (1988) 46 Cal.3d 432, 455-456 & fn. 10; *People v. Siripongs, supra,* 45 Cal.3d at p. 583; see also *People v. Gallego* (1990) 52 Cal.3d 115, 200; *People v. Gonzales* (1990) 51 Cal.3d 1179, 1233-1234; *People v. Burton, supra,* 48 Cal.3d at pp. 864-865; *People v. Adcox, supra,* 47 Cal.3d at p. 273; *People v. Walker* (1988) 47 Cal.3d 605, 643-644; *People v. Moore* (1988) 47

Cal.3d 63, 92 & fn. 13.) The majority puts in doubt the continuing validity of all these cases by asserting that they are now in "apparent conflict" with *People v. Howard* (1992) 1 Cal.4th 1132, 1195. But the opinion in *Howard* provided no reasoning or analysis to support the one sentence in that opinion that is arguably inconsistent with this otherwise unbroken line of authority, nor did it discuss or even acknowledge any of the contrary decisions listed above. The suggestion in Howard that factor (j) can be aggravating carries no persuasive force and should therefore be disapproved.

In *People v. Hernandez, supra,* 47 Cal.3d 315, 364, this court said that because the defendant in that case was the sole perpetrator of the murders, factor (j) "obviously did not apply. . . . " What was obvious to a unanimous court in *Hernandez* has become obscure to the current majority, and for no good reason. The mandate of this court is to settle important questions of law (Cal. Rules of Court, rule 29(a)), not to unsettle them. I decline to join the majority in unsettling the proper meaning and scope of factor (j).

KENNARD, J.

DISSENTING OPINION BY MOSK, J.

I dissent.

In my view, the court committed reversible error by commenting as it did on the evidence and defendant's credibility.

I

Trial on the question of guilt or innocence was conducted in late 1982 in rural Shasta County. It was charged that, on April 21 or 22 of that year, defendant burglarized the residence of Bonita Bergh Stendal in the small mountain community of Burney and there proceeded to rape and murder the woman; it was alleged that he intentionally inflicted great bodily injury on Stendal in the course of the burglary and the rape, and that he murdered her under the special circumstances of felony-murder-burglary, felony-murder-rape, and torture murder.

Between December 8 and 14, the People presented evidence to establish defendant's guilt. Included were three palm prints at Stendal's residence: a bloody and visible print from defendant's right hand, and two dry and latent prints, one from his right hand, the other from his left. Also offered were various extrajudicial statements he had made relating to his activities and whereabouts on April 21 and 22.

On December 14, defendant presented evidence. He took the stand to deny involvement in the crimes and to attempt to explain his palm prints and extrajudicial statements. He sought to exculpate himself and to inculpate his friend Robert Manley.

On December 15, the prosecutor and defense counsel delivered their summations. The prosecutor's position was, of course, that defendant was guilty. He argued, in part, as follows: Stendal had been murdered; someone was obviously responsible; that someone was defendant; his palm prints placed him in the Stendal residence; true, he gave exculpatory testimony about his activities and whereabouts on April 21 and 22, within the house and without; his statements on the stand, however, did not explain the palm prints and were inconsistent with his statements out of court, which in turn were inconsistent with each other; as a result, his exculpatory testimony lacked credibility. Defense counsel's position was to the contrary. His argument included an attempt to counter practically all the prosecutor's points.

Also on December 15, the jury was instructed on the murder, rape, and burglary charges and the special circumstance and great-bodily-injury allegations. The panel then commenced its deliberations and spent less than an hour at the task. The court recessed the proceedings for the day.

On December 16, at morning's opening, the court effectively instructed the jury to begin its deliberations anew after it substituted an alternate juror in place of one of the original members, whom as it stated it had discharged on stipulation because of a sudden illness. The panel deliberated about four and one-quarter hours. The foreman then reported to the court that the jurors were at an impasse and requested direction on how to proceed. The court asked whether the panel had voted on murder. The foreman said yes. The court asked for the numerical count without disclosure of the position as to guilt or

innocence. The foreman said 11 to 1. The court asked whether the panel had voted on rape. The foreman said no. The court posed the same question about burglary. The foreman gave the same answer. The court then informed the jurors that they faced a situation that was not unusual, and might need more time to make their determinations. It recessed the proceedings for the day.

On December 17, the jury deliberated about two and one-half or three and one-half hours. At the foreman's request, the court reread the instructions to the panel. The jury deliberated about one and one-half hours more.

Late that afternoon, the foreman sent the court a note that Juror Mae Lois Turner – who was evidently the only Black person on the panel – "would like to disqualify self. Would like to be replaced by alternate."

In open court, in the presence of the other members of the panel, Juror Turner confirmed the report. The court asked, "Why is it you wish to disqualify yourself?" She answered, "Because I'm the one," "I'm the one who is – there is eleven to one. I'm the one." The court stated, "That would not be – that's not justification for disqualification. If you have some problem – " She interjected, "I don't have any problem, Judge," and explained, "I have my opinion and I don't want to be – I don't want to be pressured into doing something, and they have their opinion, and I have mine." The court responded, "Well, that's fine. There is no problem with that, so long as you're discussing the evidence." One of the jurors remarked, "Everybody is getting tired with one another."

Addressing all the jurors, the court stated that the case was complicated and relatively little time had been spent in deliberations. It reread the instruction that both the People and defendant were entitled to the individual

opinion of each juror. It also reminded the jurors that they were under a duty to proceed conscientiously, and expressed its belief that they were doing so. It then noted the lateness of the hour. It determined that the panel had not voted on any of the charges or allegations other than murder. It recessed the proceedings until December 20.

On December 20, without notice to the People or defendant and before deliberations resumed, the court made a comment to the jurors and alternate jurors concerning the evidence and defendant's credibility. It opened with a statement that its words were intended to be "advisory only" and were "not binding." It then proceeded: there was no question that the killing of Stendal was murder; rather, the basic question was whether defendant was the murderer; his palm prints placed him in the Stendal residence; true, he gave exculpatory testimony about his activities and whereabouts on April 21 and 22, within the house and without; his statements on the stand, however, did not explain the palm prints and were inconsistent with his statements out of court, which in turn were inconsistent with each other; as a result, his exculpatory testimony lacked credibility. It closed by repeating its statement that its words were intended to be "advisory only" and were "not binding."[1] The jury then

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[1] "Ladies and gentlemen of the jury and the alternates, for the purpose of assisting you in deciding this case, I am permitted by the [C]onstitution of California to comment on the issues, the evidence and the testimony and credibility of any witness. And it occurred to me that before you retired to continue your deliberations this morning that some comment along those lines might be of some assistance to you.

"Now, you should keep in mind that my comments are intended to be advisory only, and are not binding on you, as you

deliberated about three and one-half or four and one-half

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are the exclusive judges of the questions of fact submitted to you and of the credibility of the witnesses. You should disregard any or all of the comments, if you do not agree, if they do not agree with your views of the evidence and the credibility of the witnesses.

"Now, under California law, by definition, the word 'homicide' means the killing of one human being by another, either lawfully or unlawfully. Now, under the instructions that I've given you, the word homicide includes murder. And I've given you in that connection instructions on first degree murder as well as instructions on second degree murder. There is the word homicide, however, also means the lawful killing of another – of a person by another. And that's in situations where the act occurs as a result of some excusable or justifiable – under the law – reason for killing. In this particular case, we do not have a justifiable or lawful killing of a human being by another. There shouldn't be any doubt in anyone's mind that the death, the killing of Bonita Bergh Stendal was an unlawful killing of her by another person. There is absolutely no evidence whatsoever that she was killed in self defense or any other type of reason or that she killed herself. There shouldn't be any doubt in anyone's mind on the facts that have been presented in this case, that we have an unlawful killing of Ms. Stendal by another person.

"Now, the real question in this case is whether the State, the district attorney, has proved beyond a reasonable doubt that the defendant is legally responsible for the killing. That's basically the issue here, as well as if the State has proved beyond a reasonable doubt that the defendant is legally responsible for the killing, have they proved beyond a reasonable doubt that it's murder in the first degree or murder in the second degree. And if they've proved beyond a reasonable doubt that it's murder in the first degree, you go on to whether they proved beyond a reasonable doubt any one or more of the special circumstances that have been mentioned. And you are also called upon to determine as to whether they've proved beyond a reasonable doubt that the defendant committed the rape, whether they

hours. It returned guilty verdicts on each of the charges and true findings on each of the allegations.

II

Article VI, section 10 of the California Constitution (hereafter article VI, section 10) declares in relevant part that "The court may make such comment on the evidence and the testimony and credibility of any witness as in its

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proved beyond a reasonable doubt the defendant committed a burglary.

"Now, in that connection, there have been several statements attributed to the defendant out of court concerning his whereabouts and activities on the night of April the 21st and the early morning hours of April the 22nd. These statements attributed to him are inconsistent with one another and are also inconsistent with his testimony here in court concerning his activities that evening and in the early morning hours of April the 22nd.

"Now, the district attorney has placed him in the house of Bonita Bergh Stendal through three palm prints; one bloody right palm print . . . was created by blood being on the palm first and then transferred. . . . In addition to that, . . . there were two dry palm prints. By that, they were latent, there was a left palm print, which was latent. . . . And another dry palm print of the right palm. . . .

"Now, the defendant has testified and given you an explanation as to what he did in that house that morning which explains the presence of the bloody palm print, but does not explain the presence of the two dry or latent palm prints. Under those circumstances, I have difficulty in believing the testimony of the defendant. Now, again, my comments are intended to be advisory only and are not binding on you as you are the exclusive judges of the questions of fact submitted to you and of the credibility of the witnesses. You should disregard any or all of the comments that I've made if they do not agree with your views of the evidence and the credibility of the witnesses."

opinion is necessary for the proper determination of the cause."

The purpose of the provision is to allow the trial judge to use his "training in analyzing testimony" and "experience in determining the credibility of witnesses" "to assist the jurors in determining what evidence has a bearing on the disputed issues in the case and to aid them in weighing the evidence. . . . " (*People v. Brock*, (1967) 66 Cal.2d 645, 650, "overruled" on a point not implicated herein, *People v. Cook* (1983) 33 Cal.3d 400, 413, fn. 13, overruled in turn on a point not implicated herein, *People v. Rodriguez* (1986) 42 Cal.3d 730, 770.)

The provision, of course, is subject to the criminal defendant's right to trial by jury under both the United States and California Constitutions. The Sixth Amendment to the federal charter, as made applicable to the states by the due process clause of the Fourteenth Amendment, declares that "In all criminal prosecutions, the accused shall enjoy the right to a . . . trial[ ] by an impartial jury. . . . " Article I, section 16 of the state charter provides that "Trial by jury is an inviolate right and shall be secured to all. . . . "

Under article VI, section 10, a court has broad power in delivering a comment. (E.g., *People v. Rodriguez, supra*, 42 Cal.3d at p. 766.) But that power is not unlimited. (E.g., *People v. Brock, supra*, 66 Cal.2d at p. 650.) As noted, the constitutional authority has been given to *judges* for the purpose of assisting *jurors*. A judge must, of course, cleave fast to the judicial role and not adopt that of an advocate. (See, e.g., *People v. Friend* (1958) 50 Cal.2d 570, 577 [construing former § 19 of art. VI of Cal. Const.,

which was the predecessor of present § 10 of art. VI of Cal. Const., and was virtually identical in relevant part thereto], "overruled" on a point not implicated herein, *People v. Cook, supra*, 33 Cal.3d at p. 413, fn. 13.) Also, any remarks he may make must further, and not frustrate, the defendant's "right to independent jury determination of the facts bearing on his guilt or innocence." (*People v. Rodriguez, supra*, at p. 766.) Accordingly, he may not state or suggest his own views on guilt or innocence. (*People v. Cook, supra*, at pp. 412-413; see *People v. Rodriguez, supra*, at p. 770.) To do so would "necessarily interfere[ ] with the jurors' ability to freely perform their fact-finding responsibility." (*People v. Cook, supra*, at p. 413.)

Not only is the court's power to comment broad, it is also "most potent." (*People v. Robinson* (1946) 73 Cal.App.2d 233, 237 [construing former § 19 of art. VI of Cal. Const.].) " 'The influence of the trial judge on the jury is necessarily and properly of great weight,' [citation], and jurors are ever watchful of the words that fall from him." (*Bollenbach v. United States* (1946) 326 U.S. 607, 612.) "The point need not be labored that the members of the jury are apt to give great weight to any hint from the judge as to his opinion on the weight of the evidence or the credibility of the witnesses. . . . " (*People v. Robinson, supra*, at p. 237.) Accordingly, the court must exercise its power "with great care" (*People v. Rincon-Pineda* (1975) 14 Cal.3d 864, 886) and "with wisdom and restraint" (*People v. Shannon* (1968) 260 Cal.App.2d 320, 331), "lest [it invade] the province of the jury as trier of fact" (*People v. Rincon-Pineda, supra*, at p. 886) or indeed "control the verdicts" (*People v. Brock, supra*, 66 Cal.2d at p. 650).

It follows that, even if it proceeds ever so cautiously, a court passes beyond the bounds of what is permitted under article VI, section 10 when its comment "hinders rather than helps the jury to perform its duty in properly considering the case." (*People v. Oliver* (1975) 46 Cal.App.3d 747, 753.) Such a situation is present, for example, where the remark "provides for the jury a means to avoid the preliminary determinations called for by the instructions on the law and instead to rely on the words of the judge in returning a conviction." (*People v. Brock, supra,* 66 Cal.2d at p. 651.) A court also exceeds the permissible by making what is "tantamount to an argument to convict" (*People v. Flores* (1971) 17 Cal.App.3d 579, 588) and – a fortiori – by stating or suggesting its own views on guilt or innocence (*People v. Cook, supra,* 33 Cal.3d at pp. 412-413).

III

Applying the foregoing principles to the facts of record, I conclude that the court committed reversible error by commenting as it did on the evidence and defendant's credibility.

Error is manifest.

To begin with, the court did not proceed "with great care" (*People v. Rincon-Pineda, supra,* 14 Cal.3d at p. 886) or "with wisdom and restraint" (*People v. Shannon, supra,* 260 Cal.App.2d at p. 331). Indeed, its intervention was altogether precipitous. Almost three full days had passed since the jury had last deliberated. Comment was premature before the jurors had returned to their task and

expressed some difficulty. It was also imprudent without notice to the People and defendant.

More troubling, the court's comment was "tantamount to an argument to convict" (*People v. Flores, supra,* 17 Cal.App.3d at p. 588) and indeed suggested that the court itself believed defendant was guilty, and could only have "hinder[ed] rather than help[ed] the jury to perform its duty in properly considering the case" (*People v. Oliver, supra,* 46 Cal.App.3d at p. 753).

Recall that part of the prosecutor's summation and the substance of the court's comment were to the same effect: Stendal had been murdered; defendant's palm prints placed him in her residence; true, he gave exculpatory testimony about his activities and whereabouts on April 21 and 22, within the house and without; his statements on the stand, however, did not explain the palm prints and were inconsistent with his statements out of court, which in turn were inconsistent with each other; as a result, his exculpatory testimony lacked credibility.

It is plain that the jury would have heard the court's comment as tantamount to an argument for conviction. How could it not? The substance of the comment was the same as part of the prosecutor's summation: it added nothing and it subtracted nothing. The prosecutor's summation was, literally, an argument for conviction. The court's comment effectively approved and adopted what was urged therein. From all that appears on the face of record, the court did not deliver the words in the passionate manner evidently employed by the prosecutor. But it delivered them nonetheless.

It is also plain that the jury would have heard the court's comment to suggest that the court itself believed defendant was guilty. Again, how could it not? Innocence depended on the credibility of defendant's exculpatory testimony. The court expressed its own view on the question in no uncertain terms: " . . . I have difficulty in believing the testimony of the defendant."

It follows that the court's comment could only have hindered the jury in the proper consideration of the case. The remark allowed the panel "to rely on the words of the judge in returning a conviction" and so "avoid the preliminary determinations called for by the instructions on the law" (*People v. Brock, supra,* 66 Cal.2d at p. 651) – determinations it clearly found difficult.

To be sure, the court told the jurors that its comment was intended to be "advisory only" and was "not binding." Such an incidental statement, however, is "insufficient to neutralize" the improper remark's "potent effect." (*People v. Cook, supra,* 33 Cal.3d at p. 410, fn. 9.)

The majority's discussion is generally unobjectionable so far as it goes. But it simply does not go far enough. It fails to discern that the court's comment was tantamount to an argument for conviction and, as such, could only have hindered the jury in the proper consideration of the case. That the trial judge's words were not identical to those in other cases is obvious – and unimportant.

I now turn from the fact of error to its consequences. "Particularly in a criminal trial," such as this, "the judge's last word is apt to be the decisive word." (*Bollenbach v.*

United States, supra, 326 U.S. at p. 612.) The court's erroneous comment was its final remark. Evidently, it was dispositive. About four hours thereafter, the jury returned guilty verdicts on *all* the charges and true findings on *all* the allegations – even though it had been unable to agree on *any* verdict or finding in the approximately nine hours that preceded. Accordingly, I am "of the opinion that the error . . . has resulted in a miscarriage of justice." (Cal. Const., art. VI, § 13.)[2]

IV

In passing, I make the following observations.

First, contrary to the majority's implication, I believe that a challenge, based on *Stringer v. Black* (1992) 503 U.S. ___ [112 S.Ct. 1130] (*Stringer*), to the standard jury instruction on the determination of penalty would surely prove substantial.

In *Stringer,* the United States Supreme Court held that "if a State uses aggravating factors in deciding who shall be eligible for the death penalty or who shall receive the death penalty, it cannot use factors which as a practical matter fail to guide the sentencer's discretion" in contravention of the Eighth Amendment. (503 U.S. at p. ___ [112 S.Ct. at p. 1139].) It explained: "Although our precedents do not require the use of aggravating factors,

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[2] Because of the result I reach, I need not and do not consider whether the court's erroneous comment effectively denied defendant his right to trial by jury under either the Sixth Amendment to the United States Constitution or article I, section 16 of the California Constitution or both.

they have not permitted a State in which aggravating factors are decisive to use factors of vague or imprecise content. A vague aggravating factor employed for the purpose of determining whether a defendant is eligible for the death penalty fails to channel the sentencer's discretion. A vague aggravating factor used in the weighing process is in a sense worse, for it creates the risk that the jury will treat the defendant as more deserving of the death penalty than he might otherwise be by relying upon the existence of an illusory circumstance." (*Id.* at p. ___ [112 S.Ct. at p. 1139].) Of course, California uses "aggravating factors" – labeled "special circumstances" (Pen. Code, § 190.2, subd. (a)) – to determine death eligibility. It also uses "aggravating factors" – bearing that very label (*id.*, § 190.3) – to decide between life and death.

A narrow *Stringer* challenge could specifically attack any one or more of the factors set out in the standard jury instruction on the determination of penalty as vague and, for that reason, likely to invite an arbitrary and capricious choice of punishment in violation of the Eighth Amendment. Defendant raises such a claim against factor (a), which covers "[t]he circumstances of the crime." The majority dismiss the point. I am dubious. That "[t]he United States Supreme Court itself has established that the circumstances surrounding a capital offense constitute one of the criteria upon which the jury *should* base its penalty determination" (maj. opn., *ante*, at p.___ [typed maj. opn. at p. 69], italics in original) is of no consequence. What is dispositive is not what jurists on appellate courts may announce, but what lay persons on juries may understand.

A broader *Stringer* challenge could generally attack the standard jury instruction on the determination of penalty as vague at its very core and, for that reason, highly likely to invite an arbitrary and capricious choice of punishment in violation of the Eighth Amendment. Certainly, the instruction raises more questions than it answers. For example, on what does the determination of penalty turn? What do the terms "aggravation" and "mitigation" mean? Which of the factors are potentially aggravating and/or mitigating? (See *People v. Bacigalupo* (1991) 1 Cal.4th 103, 152-154 (conc. opn. of Mosk, J.), vacated and remanded *sub nom. Bacigalupo v. California* (1992) ___ U.S. ___ [113 S.Ct. 32], for further consideration in light of *Stringer v. Black, supra*, 503 U.S. ___ [112 S.Ct. 1130].)

Second, factor (j) – "[w]hether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor" – is potentially mitigating and not potentially aggravating. " '[A]ggravation' means that which increases the defendant's personal moral culpability above the level of blameworthiness that inheres in the capital offense. By contrast, 'mitigation' means that which reduces his culpability below that level." (*People v. Bacigalupo, supra*, 1 Cal.4th at p. 153 (conc. opn. of Mosk, J.).) Numerous decisions of this court by many of its members establish the fact that factor (j) is potentially mitigating only. In her concurring and dissenting opinion herein, Justice Kennard proves the point beyond peradventure. Reason also establishes the fact. The question posed in factor (j) calls for one of two answers. A determination that the defendant was, in actuality, a minor accomplice may lead to the

conclusion that his culpability was less than that generally reflected by commission of the offense. But a determination that he did *not* play such a role simply does not lead to the conclusion that his culpability was greater. Loose and uncertain dictum arguably to the contrary, which appears in a single opinion that does not cite any authority or present any analysis, should be disapproved forthwith. It should not be used, as by the majority, to "create" a "conflict" where none exists.

V

Because the court committed reversible error by commenting as it did on the evidence and defendant's credibility, I would reverse the judgment.

MOSK, J.

No. CR23185
S004555

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

IN BANK

THE PEOPLE, Respondent

v.

WILLIAM ARNOLD PROCTOR, Appellant

Petition for rehearing DENIED.

Mosk, J. and Kennard, J. are of the opinion the petition should be granted.

March 10, 1993

/s/ L. [illegible]
Chief Justice

SUPREME COURT OF THE UNITED STATES

No. 93-5161

William Arnold Proctor,

Petitioner

v.

California

ON PETITION FOR WRIT OF CERTIORARI to the Supreme Court of California.

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. This case is consolidated with No. 93-5131, *Paul Palalaua Tuilaepa v. California,* and a total of ninety minutes is allotted for oral argument.

December 6, 1993